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The dry details of modern judicial opinions are seldom enlivened by a touch of humor, and, when, in the reports of decisions, we find something in the view or language of a court or of one of the judges, that provokes a smile, it is like a green spot in the desert. The dissenting opinion of Chief Justice Bleckley of Georgia in the recently reported case of *Dilberto v. Harris* is of that character. The controversy in that case was concerning a hat lost in a barber shop for which the owner sought to hold the barber responsible. Inasmuch as the costs in the case were probably many times the value of the hat, it is altogether likely that the litigants were fighting for principle rather than for pelf.

The Supreme Court affirming the lower court, held that the proprietor of a barber shop kept for public patronage is liable to a customer for the value of his hat, which was deposited on a hat-rack in the shop, and which, while the customer was being shaved, disappeared from the shop and was thus lost, such proprietor, being, under these facts, a bailee for hire as to the customer's hat. Chief Justice Bleckley, however, did not agree with his associates, and filed a dissenting opinion in which he said that "it hath never happened, from the earliest times to the present, that barbers, who are an ancient order of small craftsmen, serving their customers for a small fee, and entertaining them the while with the small gossip of the town or village, have been held responsible for a mistake made by one customer whereby he taketh the hat of another from the common rack or hanging place appointed for all customers to hang their hats; this rack or place being in the same room in which customers sat to be shaved. The reason is that there is no complete bailment of the hat. The barber hath no exclusive custody thereof, and the fee for shaving is too small to compensate him for keeping a servant to watch it. He himself could not watch it, and at the same time shave the owner. Moreover, the value of an ordinary gentleman's hat is so much, in proportion to the fee for shaving, that to make the barber an insurer against

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such mistakes of his customers would be unreasonable. The loss of one hat would absorb his earnings for a whole day; perhaps many days. The barber is a craftsman laboring for wages, not a capitalist conducting a business of trade or trust."

In *Couchman's Adm'r v. Couchman*, recently decided by the Court of Appeals of Kentucky, it was attempted to avoid a gift by an adopted child to one of her adopted parents, chiefly upon the ground that such a transaction is *ipso facto* fraudulent, on account of the relations between the parties. The court, however, thought otherwise and upheld the gift. It appeared that a husband and wife had taken and raised as their own another's child, and the latter on reaching majority received a legacy of money under the will of the husband. A gift *inter vivos* of this money—being the child's entire estate—by the child to the wife was contested, the suit being by the administrator of the child to avoid such gift.

The court ignored some English authorities cited to sustain the invalidity of the transaction, grounding its decision upon the case of *Jenkins v. Pye*, 12 Pet. 253, where a gift from a daughter to a father was upheld, and the English authorities, wherein such a gift is declared *prima facie* void, were repudiated.

The *Harvard Law Review* calls attention to the recent case of *Robins & Co. v. Gray* in the English Court of Appeal which brings up an interesting legal question. In that case it appeared that a commercial traveler did not pay his hotel bill, and the proprietor set up a lien on certain articles in his custody, although he had known all along that they were the property of the salesman's employer. The court held that, as the innkeeper was bound to receive the articles, regardless of whose they were, he was entitled to his lien, notwithstanding his private knowledge of the ownership. Lord Esher's opinion is refreshing. Whether agreeing with his conclusion or not, all will welcome so clear and straightforward a treatment of a subject which has often been handled vaguely and unsatisfactorily.

The statement in the opinion that the decision represents what has been the undisputed law for centuries strikes the *Harvard*

Law Review as rather broad, calling attention to *Broadwood v. Granada*, 10 Exch. 417 and *Threfall v. Borwick*, L. R., 7 Q. B. 711, wherein the courts had evidently a contrary principle in mind. Wharton on Innkeepers, p. 119, makes the unqualified assertion that the innkeeper has no lien on goods he knows are not the property of the guest. That this is the view of American courts is shown by such cases as *Cook v. Kane*, 13 Oreg. 482 and *Covington v. Newberger*, 99 N. C. 523. The *Harvard Law Review*, however, thinks that the doctrine of this latest English case is clearly preferable, saying, that "as the innkeeper's lien is grounded, not on the credit he gives his guest on the faith of the goods, but on the extraordinary liability imposed on him by law, it seems only just that on all goods which he is bound to receive he should have his lien, whether or not he knows them to be the property of another than his guest. As to articles which he is not bound to receive, his state of knowledge or ignorance may be material, but in the ordinary case, where he has no choice, it should not be the crucial test."

NOTES OF RECENT DECISIONS.

CRIMINAL LAW—RAPE — EVIDENCE—DECLARATIONS OF INJURED FEMALE.—In *State v. Myers*, 64 N. W. Rep. 697, it is decided by the Supreme Court of Nebraska that evidence of the complaints of the injured party in a prosecution for rape are admissible only as corroborative of her testimony, and are not, except when made *in extremis*, admissible as independent evidence of the offense charged; and that when in such case the injured female does not testify as a witness, her declarations relating to the alleged assault are not admissible in evidence, and the fact that she is incompetent to testify, on account of imbecility or for other reasons, is wholly immaterial. The court says:

Did the court err in rejecting evidence of the statements above mentioned? It was shown without objection that the said Elizabeth left the home of her sister, Mrs. Rauscher, about 2 o'clock P. M. of the day in question, going into "the timber" to look for the cows, and returned between 4 and 5 o'clock. At that time her underclothing was torn, and the condition of her person strongly indicated the commission of the wrong alleged. Indeed, so strong is the inference of the outrage from the facts in evidence that we may, for the purpose of this examination, assume

the *corpus delicti* to have been fully established. It was held by this court, in *Oleson v. State*, 11 Neb. 276, 9 N. W. Rep. 38, that, while it is permissible to show that the prosecutrix made complaint of the alleged injury, such complaint constitutes no part of the *res gestae*, but is a circumstance only, corroborative of the story of the prosecutrix, and that, unless she is a witness in the case, is wholly inadmissible. See, also, *Mathews v. State*, 19 Neb. 337, 27 N. W. Rep. 234; *Hannon v. State*, 70 Wis. 448, 36 N. W. Rep. 1; *People v. McGee*, 1 Denio, 19; *Weldon v. State*, 32 Ind. 81; *Reg. v. Nicholas*, 61 E. C. L. 246; 1 Greenl. Ev. 213. But the identical question here involved was presented in *Hornbeck v. State*, 35 Ohio St. 277, in which, after a careful review of the authorities, it is held that, where the female alleged to have been assaulted is, by reason of imbecility, incompetent to be sworn as a witness, her declarations are inadmissible for the purpose of proving the alleged offense. In the opinion in that case, by Gilmore, C. J., we find the rule thus tersely stated: "In cases of violence to the person, except when made *in extremis*, the declarations of the injured party are hearsay, and therefore inadmissible to prove the offense, and the fact that the declarant is incapable of taking an oath, by reason of imbecility, insanity, or infancy, will not justify a departure from the long and firmly established rule of evidence on the subject." The ruling of the district court must, in the light of the authorities cited, be regarded as sound.

PRINCIPAL AND SURETY—LIABILITY ON OFFICIAL BOND.—The Supreme Court of Oregon decides, in *Baker City v. Murphy*, that the sureties on the official bond of a city treasurer, elected for one year under a city charter, providing that he shall hold office until his successor is elected and qualified, are liable for defalcation of their principal after the expiration of the year, while holding over pending the qualification of his successor. The court says:

It is a well-settled rule of law, recognized generally, if not by all the authorities, that bonds or obligations given to secure the performance of official duties are to be construed with reference to the term for which the incumbent is elected or appointed; and it is equally well settled that the law governing as to the term, its time of commencement and expiration, and the conditions and contingencies upon which it shall begin, continue, and come to an end, enters into and forms a part of such bonds or obligations, where general language is used in stipulating the conditions. Sureties upon such undertakings are presumed to have known the duration of the term when they became parties to them, and to have intended to bind themselves to the extent, and for and during the time that their principals are bound. It is only upon the application of the rule to statutory enactments governing the tenure of office that the authorities appear to part company. *Welch v. Seymour*, 28 Conn. 393; *Kitson v. Julean*, 24 Law J. Q. B. 204; *Wapello Co. v. Bigham*, 10 Iowa, 42; *Treasurer v. Mann*, 34 Vt. 371; *Waterworks Co. v. Atkinson*, 6 East, 511; *Wardens v. Bostock*, 5 Bos. & P. 179; *Lord Arlington v. Merricke*, 2 Saund. 412; *Hassell v. Long*, 2 Maule & S. 368; *Bank v. Hunt*, 72 Mo. 597; *Thompson v. State*, 37 Miss. 522; *State v. Berg*, 50 Ind. 496; *Sparks v. Bank*, 3 Del. Ch.

300; Riddel v. School Dist., 15 Kan. 168; Mayor, etc., v. Crowell, 40 N. J. Law, 207; State v. Crooks, 7 Ohio, pt. 2, p. 221; Scott Co. v. Ring, 29 Minn. 401, 13 N. W. Rep. 181. Considered in the light of this rule of interpretation, did S. F. Murphy's term of office as city treasurer come to an end November 6, 1893? If it did, —if it expired absolutely upon that date,—then his acts thereafter were *functus officio*, in so far, at least, as they could have any binding force and effect touching the liabilities of the sureties upon his official bond. In the State constitution (section 1, art. 15), it is provided that "all officers—except members of the legislative assembly—shall hold their offices until their successors are elected and qualified." Under this section, and the provisions of an act regulating the election of railroad commissioners, wherein the term of office was fixed at two years, "and until their successors are elected and qualified," it has been recently held by this court (Eddy v. Kincaid, 41 Pac. Rep. 156) that such commissioners were entitled both to the office, and the emoluments thereof, while holding over after the expiration of the two-years term, the legislature having failed to elect their successors. And in State v. Simon (Or.), 26 Pac. Rep. 170, Bean, J., says: "But, whatever the rule at common law may have been, it is clear that when, by the constitution or law, officers are elected or appointed for a term, and until their successors are elected and qualified, they are thereby authorized to hold and exercise their offices until their successors are duly elected or appointed under some existing provision of law." So that the law may be considered as settled that State officers holding over under the constitution, or under an act of the legislature entitling them to hold "until their successors are elected and qualified," unless otherwise restricted, are entitled both to the office and the emoluments appurtenant thereto. The charter of Baker City was accorded to it by the legislature. By its provisions (section 9) it is enacted that "the treasurer shall be elected for one year by the qualified voters of Baker City at each general election as hereinafter provided, and shall hold his office until his successor is elected and qualified." Laws 1895, p. 452. While this is not a State office, the legislature has provided that the treasurer shall hold until his successor is elected and qualified, which it had the undoubted right and authority to do; and, by a parity of reasoning, the tenure of office must be governed by this express provision. Can it be said, then, that the treasurer's term of office had come to an end on the 6th day of November, 1893? And in what respect can it be said that his subsequent acts are *functus officio* while holding over pending the election and qualification of a successor?

In State v. Berg, 50 Ind. 501, the court say: "Under the constitution, as well as under the law fixing the term of Berg's office, it is clear that he was entitled to hold the office, not only for the year, but until his successor was elected and qualified. As long as he continued in the office, his successor not having been elected and qualified, he was such officer, not *de facto* merely, but *de jure*. The constitution, and law under which he was elected, enacted in pursuance of the constitution, made him such." The conclusion reached here is based, it is true, upon the constitutional as well as the statutory provision on the subject, but it is a direct adjudication as to the tenure of the office. State v. Smith, 87 Mo. 158, is a case much in point, with the constitutional element eliminated, and arose under the provisions of the charter of the city of St. Louis. Black, J., in delivering the opinion of the court, says: "It is true, the law by which the

relator was appointed fixed the term of office at four years, and contemplates that at the expiration of that time a new appointment will be made; but the same law also contemplates that the appointing power may not be promptly exercised, and to prevent a vacancy the incumbent is made to hold over until such appointment is made. This is a contingency contemplated by the law, and enters into every such appointment, and the time he holds over the designated period is as much a part of the term of his office as that which precedes the date at which the new appointment should be made. We have seen, this is so for all purposes of holding the office, and in suits against the officer and his sureties on his official bond, and it must also be true with respect to the emoluments of the office." See, also, Bank v. Hunt, 72 Mo. 597; Long v. Seay, *Id.* 648; and State v. Kurtzborn, 78 Mo. 99. In Taylor v. Sullivan (Minn.), 47 N. W. Rep. 802, it is held that "the incumbent of an office, the term of which is for a specified period, 'and until his successor is elected and qualified,' is entitled to retain the office after the lapse of the specified period, in the event of the election of another person to succeed him who is ineligible." See, also, in support of this doctrine, State v. Benedict, 15 Minn. 198 (Gil. 153), and People v. Tilton, 37 Cal. 614. And if no vacancy occurs the incumbent's term must be continuous. In State v. Howe, 25 Ohio St. 597, it is held that an incumbent so holding over after the technical term is in office *de jure*; but it was there thought that the time intervening the expiration of the period fixed by the statute and the election and qualification of a successor was not a part of the preceding term, and that the holding over was *pro tempore*. In other cases it is held that the holding over is but an occupancy of that portion of the successor's term. See Riddel v. School Dist., 15 Kan. 170. One thing, however, is palpably manifest,—that the right to hold over is by virtue of the previous appointment or election and qualification; it is a right accorded by statutes regulating the tenure of office. The holding does not come to an end on the day of the expiration of the statutory period, unless there comes a duly elected and qualified officer to cut it off, or unless his recognized successor is inducted into the office. In one sense, the holding over is *pro tempore*, because the time of the holding is dependent upon the election or appointment of a successor; and in another it may be considered as the occupancy of a successor's term, which is shortened by that length of time. But the holding for the technical term and the holding over is a recognized right arising from one appointment or one election. The tenure of office is indivisible. It cannot be considered as a broken term, or as a double term; it is one continuous holding; and a holding over abiding the election of a successor, it seems to us, is as much a part of the term of office as that which precedes it, and the interpretation of the bond in question must be governed accordingly.

The city charter provides (section 23) that "every person elected to office under this act shall qualify by taking and filing with the auditor within ten days from his election an oath of office;" and it is contended for this provision that a failure or refusal to thus qualify within 10 days has the effect to vacate the office. However this may be, the clause in question has reference to the officer elect, and not to an incumbent who has already qualified, and is holding over the particular term. There is no provision in the charter requiring an officer holding over pending the election of his successor to requalify. If there is,

our attention has not been called to it. He continues in office by virtue of his previous election and qualification, and the term is coextensive with his holding in that capacity. In coming to this conclusion, we have not been unmindful of the rule that the contracts of sureties are to receive a strict construction, and that they ought not to be bound, except by the letter of their undertaking.

As bearing upon the foregoing conclusions, we cite, also, *Badger v. U. S.*, 93 U. S. 599; *State v. Saxon*, 25 Fla. 792, 6 South. Rep. 858; *Placer Co. v. Dickerson*, 45 Cal. 12; *Mayor, etc. v. Brooks*, 49 Ga. 179; *Kimberlin v. State (Ind. Sup.)*, 29 N. E. Rep. 773; *People v. Beach*, 77 Ill. 52. Nor is *King Co. v. Ferry (Wash.)*, 32 Pac. Rep. 538, opposed to this view. There the legislature enlarged or extended the term after the execution of the bond. This was held—and correctly, too—to be an impairment of the sureties' contract; for at the time of assuming the obligation they could not have had in mind the extended period which the legislature afterwards saw fit to add to the term fixed by law, and did not engage to become responsible for the acts of their principal during the added period. Mr. Throop, in his work on Public Officers ('Sec. 213'), says: "But, whatever may be the true rule in the case of a wrongful holding over, the weight of American authority sustains the proposition that, where an officer holds over rightfully,—that is, pursuant to a statute providing that he shall hold over until his successor shall be chosen, or shall be chosen and qualified,—this constitutes one of the exceptions to the rule that the liability of the sureties in an official bond does not extend beyond the principal's term, and that the sureties are liable for his defaults during the additional time." See, also, in this connection, *Thompson v. State*, 37 Miss. 522, and *State v. Wells*, 8 Nev. 105. And this view has been adopted in *Eddy v. Kincaid*, *supra*. But whether considered as an exception, or as the rule itself, it can only be sustained upon the principle that the holding over is a continuation of the term, and together with the technical term, constitute one and the same term.

Many authorities are cited by counsel for appellant, of which *Chelmsford Co. v. Demarest*, 7 Gray, 1, is the leading case, in support of the contention that the sureties are not held beyond the particular term. But it will be found, upon an examination of these authorities, that nearly all of them consist of cases where the incumbents have been re-elected or reappointed to the same office, and the authorities have permitted them to continue in office without again qualifying. In such a case it is the duty of the authorities to require the incumbent to requalify, and, upon his failure or refusal to comply with the requirement, to declare the office vacant, failing in which the sureties are not bound beyond the term, or, as some of the authorities say, a reasonable time thereafter. See, in this connection, *Rany v. Governor*, 4 Blackf. 5. The case is the same as if one officer succeeds another by election or appointment, and is inducted into the office without qualifying. The former term lapses, and the new one begins with an incumbent without sureties for the due and faithful observance of his duties. These authorities are without relevancy here.

MASTER AND SERVANT — LIABILITY OF MASTER—USE OF EXPLOSIVES.—In *Burke v. Anderson*, 69 Fed. Rep. 814, decided by the United States Circuit Court of Appeals for the Seventh Circuit, it appeared that one M was

a contractor, engaged in making a road-bed for a railroad, and one J had sole charge of the work for him as general manager and superintendent. The work was carried on by blasting the frozen ground with dynamite and other explosives, and afterwards breaking it up with picks, J having personal charge of the blasting. Plaintiff, a common laborer, unfamiliar with the use of explosives, was hired by J, and set to work, digging with a pick, at a spot where the blasting had been done the day before, without warning of possible danger. Plaintiff was injured by an explosion caused by striking with his pick a piece of dynamite remaining from the blast, which was found to have been negligently conducted. It was held that as M had created the risk due to the presence of explosives for his own purposes, and was bound not only to exercise the utmost care and every available precaution against possible injury to the workmen, but to give them warning of the risk, and as plaintiff was ignorant of the risk when he undertook the work of digging, M was liable to plaintiff for the injury suffered. The court said in part:

This conflict must be resolved in accordance with the general rule, which is clearly pronounced in the recent decision by the Supreme Court in *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464. There the plaintiff was without experience in mining or in the use of explosives, and was employed in operating the drums in the engine house of a mine. Explosives for mining purposes had recently been stored in the engine house, and the heat and the jarring incident to that place were a constant source of danger, of the nature of which the plaintiff was not well advised. An explosion occurred, the cause of which was not definitely shown, and the plaintiff was injured. His action was against the operators of the mine for negligence. The instructions of the court below left it to the jury to decide whether the defendants were negligent in so using and storing the exploding caps and material, and in failing to give the injured employee due warning of their dangerous character, and their verdict was against the defendants upon the issue thus presented. In affirming the judgment, the court, speaking unanimously, through Mr. Justice Field, states the doctrine applicable here: "All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business, and having sufficient skill therein, may properly be employed upon them; but in such cases, where the occupation is attended with danger to life, body, or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution; and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. The explosive nature of the

materials used in this case . . . was well known to the employers, and was a continuing admonition to them to take every precaution to guard against explosion. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. . . . If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers, by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained." And the same doctrine is asserted in the opinion of Judge Jenkins for this court, in *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. Rep. 400, as follows: "One who uses a dangerous agency does so at his peril, and must respond to the injuries thereby occasioned, not caused by extraordinary natural occurrences, or by the interposition of strangers." The case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, affirmed L. R. 3 H. L. 330, there cited, is well in point. In the case at bar the only explicable cause of injury to the plaintiff was the presence in the ground of some remnant of the explosives which had been employed in blasting. The danger was not inherent of his work; was not one to be anticipated in the labor with pick and spade in a gravel cut for which he was hired; it was not of natural or purely accidental origin, but was produced by the act or requirement of the master in using a dangerous agency to advance his undertaking. Except for the explosive materials carried there for the master's purposes, the plaintiff could have worked safely in the place to which he was assigned. The testimony is undisputed that he had engaged in the work only three days before, had no experience in or knowledge of the use or danger of explosives thus employed, and had no information or suspicion that danger was incurred by digging in this ground. He obeyed the express order of the superintendent to enter and work there, relying, as he had a right to rely, upon the implied assurance of the master that the place was reasonably safe; that there was no other danger there "than such as was obvious and necessary." *Railroad Co. v. Baugh*, 149 U. S. 368, 386, 13 Sup. Ct. Rep. 914. The master provides the place for his servant to work, and, if his acts create special danger, he is not alone chargeable with the positive duty to exercise the utmost care and every available precaution against possible injury to those who are to work there; but, if danger impends notwithstanding the precautions taken, he is further obligated to give due information and timely warning to those in his service who are ignorant of its extent before calling upon them to incur the risk.

In respect of the employment of the plaintiff and the directions for his work, it is unquestionable and conceded that the superintendent represented the master as vice-principal. In the same relation he is chargeable with knowledge of the danger in using the explosives, and with the duty to protect employees and notify them of risk. If the plaintiff was not in-

formed of the peril which compliance with the order involved, or it was not clearly apparent, the risk thus created cannot be held to have been contemplated in the service in which he engaged, and therefore it was not one assumed by him in his employment. The instructions requested on behalf of the principal defendant, and the theory of the whole defense as well, rest upon the claim that the operation of blasting was common labor, and not the work of a superintendent or vice-principal; that its performance by this superintendent was in the character of fellow-servant, and the master was not liable for any neglect therein beyond the exercise of ordinary care in selecting his servants. In the same connection it is argued that the use and care of the explosives was not a personal duty of the master. Whether these claims could be maintained by the master in any case in which he brings into his work the dangerous means which produce injury, and whether the rule of strict care does not impose a positive obligation which he cannot evade by delegating the performance, are questions of interest, but they do not require consideration here. It is sufficient that the risk was created by the master or for his purposes; that there is legitimate finding by the jury of negligence on the part of those engaged in the performance, causing the injury; and, finally, that the plaintiff was ignorant of the risk, and had not assumed it. The doctrine which exempts the master from liability arising out of the negligence of fellow-servants is based upon the assumption by the servant of the ordinary risks of his employment, in which the negligence of fellow-servants is included, but it has no application to risks which are not contemplated by him in entering upon the service (*Railroad Co. v. Hamby*, 154 U. S. 349, 357, 14 Sup. Ct. Rep. 983), and certainly cannot govern for this extraordinary risk interposed by the master without warning. The cases which are cited in support of the defendant's contention are clearly distinguishable in their facts, and are not inconsistent with the rule applied here. In *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. Rep. 525, the injured servant was a blaster hired for and engaged in the use of the explosive, and acquainted with the danger incurred. In *Cornelison v. Railway Co.*, 50 Minn. 23, 52 N. W. Rep. 224, the plaintiff was directly engaged in the blasting in which he received his injury and had experience in the work. Neither case presents the want of knowledge or notice shown by this plaintiff.

COMBINATION TO WITHDRAW PATRONAGE UNLESS CONDITIONS OBSERVED.—The Supreme Court of Rhode Island decide, in *McCauley v. Tierney*, 33 Atl. Rep. 1, that an agreement by members of a national association of master plumbers to withdraw their patronage from any dealer selling supplies to others than master plumbers is not unlawful, even though "master plumbers" be construed to mean the members of such association; and that an allegation that said association conspired to ruin complainants' business was not established by evidence of such agreement. The following is from the opinion of the court:

A leading and well considered case on this subject was *Steamship Co. v. McGregor*, 23 Q. B. Div. 598 (1892), App. Cas. 25. In this case the defendants

who were shipowners, had formed a league for the purpose of keeping in their own hands the control of the tea carrying trade between London and China, and for the purpose of driving the plaintiff and other competing shipowners from the field. The acts complained of as unlawful by which the defendants sought to accomplish their purpose were: (1) The offer to local shippers and other agents by way of rebate if they would not deal with the plaintiff, which was to be lost if this condition was not fulfilled; (2) the sending of special ships to Hankow, in the hope by competition to deprive the plaintiff's vessels of profitable freight; (3) the offer at Hankow of freight at so low a rate as not to repay the shipowner for his adventure, in order to smash freights and frighten the plaintiff from the field; (4) pressure put on their own agents to induce them to ship only by the defendants' vessels, and not by the plaintiff's. The plaintiff alleged that the league was a conspiracy, and claimed damages and an injunction against a continuance of the alleged unlawful acts. It was held that since the acts of the defendants were not in themselves unlawful, and were done by them with the lawful object of protecting and extending their own trade and increasing their profits, and as they had employed no unlawful means, the plaintiff had no cause of action. Bowen, L. J., remarks (page 614): "His (the trader's) right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation, are forbidden; so is intentional procurement of the violation of individual rights, contractual or other, assuming, always, that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton v. McGawley*, Peake, 270); the obstruction of actors on the stage by preconcerted hissing (*Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 Man. & G. 205); the disturbance of wild fowl in decoys by the firing of guns (*Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickeringill*, *Id.* 574, note); the impeding or threatening of servants or workmen (*Garret v. Taylor*, Cro. Jac., 567); the inducing of persons under personal contracts to break their contracts (*Bowen v. Hall*, L. R., 6 Q. B. Div. 333; *Lumley v. Gye*, 2 El. & Bl. 216), all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that competition so pursued ceases to have a just cause or excuse when there is ill will or personal intention to do harm, is sufficient to reply . . . that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would be but for such motive justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange

and impossible counsel of perfection." The case at bar contains no element of the character of those enumerated by the Lord Justice which are forbidden by law, unless the threat of the withdrawal of patronage may be considered as amounting to coercion. We do not think, however, that such a threat can be regarded as coercive within the legal sense; for though coercion may be exerted by the application of moral as well as physical force, the moral force exerted by the threat was a lawful exercise by the members of the associations of their own rights, and not the exercise of a force violative of the rights of others, as in the cases cited by the Lord Justice. It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage on whomsoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the association more than that of the non-members, they would doubtless comply; otherwise, they would not. Closely analogous to the case at bar was the recent case of *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. Rep. 119.

SALE OF REAL ESTATE—EQUITIES OF HOLDER OF OPTION UPON DESTRUCTION OF PREMISES.

[Conclusion of Article on page 209, Current Volume.]

II. SPECIFIC PERFORMANCE WITH COMPENSATION.

But if the conversion, as between the purchaser and the vendor, does not relate back from the exercise of the option, so as to make the purchaser the owner, from the granting of the option; and if, on the other hand, the contract of insurance is personal and he cannot claim insurance not effected by him, it remains to inquire whether he can insist upon a specific performance of the contract, with compensation for the deterioration in the premises caused by the fire. The questions which arise upon this contract are: (1.) Is there a contract which will support a bill for specific performance? (2.) Will the acceptance of the offer by the vendee with knowledge of the subsequent loss be regarded as an acceptance of the property in its deviated condition? (3.) Will it be regarded as such negligence in making the contract as will preclude him from relief?

1. Is there a contract which will support a bill for specific performance? By the terms of the proposal of the vendor it was to remain open for three weeks. Before the expiration of that time it was accepted. That acceptance constituted a valid contract.¹

¹ Bish. Cont. § 321, *et seq.*; Hare Cont. § 340, *et seq.*; 1-Whart. Cont. §§ 13-15.

In Boston, etc. *R. Co. v. Bartlett*,² a bill in equity alleging that defendants, owners of certain lands, in consideration that the company would take into consideration the expediency of buying the lands, agreed in writing to sell them for a certain sum if the company would take them "within thirty days from that date," and alleging that plaintiffs elected to take the lands within the time specified, was sustained on demurrer. The court said: "Though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and during the whole of that time it was an offer every instant, but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for defendants is most surely right in saying that the writing when made was without consideration, and did not, therefore, form a contract. It was, then, but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance. But when the offer was accepted, the minds of the parties met and the contract was complete. There was then the meeting of the minds of the parties which constitutes, and is the definition of a contract." Subsequently, upon a hearing on the merits in this case, the bill was dismissed because it appeared by a delay of three years after the final refusal of defendants to convey before bringing the suit, and from other evidence, that plaintiffs had abandoned their contract.³ But that decision does not affect the authority of the ruling on the demurrer. The destruction of the building by fire before the acceptance of the vendor's offer, and the vendee's knowledge of the fact at the time of acceptance, cannot operate a revocation of the offer. It may be conceded that there need not be an express and actual withdrawal of the offer. But, since the proposer has expressed a willingness to contract on a certain basis, he is presumed to continue in that mind until he has, of his own volition, done something to indicate an altered intention. Thus, in the leading case of *Dickinson v. Dodds*,⁴ it was held, on appeal, overruling *Bacon v. V. C.*, that where the vendor before the accept-

ance of an offer, which was "to be left over until Friday, 9 A. M.," sold the property in question to a third person, that such a sale must be regarded as a revocation of the offer. So the death of the proposee before the offer is accepted will operate a revocation of the offer.⁵ Said the Illinois Supreme Court, in so ruling: "The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man." It has been suggested that the proposer's insanity, if of such a character as to extinguish his capacity of contracting, ought to be regarded as revoking his offer.⁶ But no case has been discovered holding that any accident or misfortune, apart from a mental change in the proposer himself, can operate a revocation of his offer. On what theory can the purchaser assume a revocation from the damage to the premises? It may very possibly suit the vendor better to restore them to their previous condition, or else to proportionately abate the purchase money.

2. Will the acceptance of the offer by the vendee, with knowledge of the subsequent loss, be regarded as the acceptance of the property in its deteriorated condition? It cannot be so presumed. The vendor's offer is of his property as it stands at the time, and the vendee must be taken to have contracted with a knowledge of the law on the subject. It must be assumed that he knew that the equitable conversion did not take effect until the contract was completed by acceptance; that, until then, the property was real estate in the hands of the vendor; that under the equitable doctrine the risk of loss by fire is upon the vendor until the conversion takes place;⁷ and that under the common law rule the risk is upon him until the actual conveyance of the property;⁸ that until the vendor's offer was revoked the acceptance of it would have the effect to bind him as of its date.

² *Pratt v. Trustees*, 93 Ill. 475.

³ *Bramwell, L. J. in Drew v. Nunn*, L. R. 4 Q. B. Div. 669. It was so held in the case of a contract of subscription in *Beach v. First Methodist Church*, 96 Ill. 177, on authority of *Pratt v. Trustee*, *supra*.

⁷ *Serg. Vend. & P. 8th. Am. Ed. Vol. 1, p. 446; McKeehn v. Sterling*, 48 Barb. 330.

⁸ *Gould v. Murch*, 70 Me. 228; *Thompson v. Gould*, 20 Pick. 134; *Wells v. Calman*, 107 Mass. 514; *Gould v. Thompson*, 4 Mete. 224.

² 3 Cush. 224.

³ 10 Gray, 384.

⁴ L. R. 2 Ch. Div. 463.

3. Will the acceptance of the offer with knowledge of the loss be regarded as such negligence on the part of the purchaser as will preclude him from relief? The general rule is thus stated by one of the ablest writers on equity jurisprudence: "If the vendee, at the time of entering into the contract, knows or is sufficiently informed that the vendor's title is defective, or that his interest is partial, or that the subject-matter is deficient, he is not entitled to any compensation."⁹ The precise effect and limitations of this rule can be best ascertained by examining the cases cited to support it. Thus, in *Peeler v. Levy*,¹⁰ the vendee had knowledge of circumstances sufficient to put him on inquiry that would have disclosed the fact that the vendor's wife had the title to two of the four parcels of ground which the vendor contracted to convey, and the further fact that she was unwilling to join in the deed. It appearing that the wife was unwilling to join in the deed to the parcels owned by her husband for the purpose of releasing her inchoate right of dower, the court refused the relief. In *Franz v. Orton*,¹¹ in Illinois, where the vendor held the legal title as security for money which he had advanced to the equitable owner, it was held that possession of the land by the tenants of the equitable owner, was sufficient to charge the vendee with notice of his rights and partial performance with compensation would be refused. In *Castle v. Wilkinson*,¹² where husband and wife agreed to sell the wife's estate in fee simple, the vendee knowing that it was the wife's property, and the wife subsequently refused to join in the conveyance, the court held that the husband could not be compelled to convey his interest for the joint lives of himself and wife, and accept a reduced price, since the contract was to convey the wife's estate, and the purchaser knew that he could get only what the wife was willing to convey. The court there distinguishes *Barnes v. Wood*,¹³ where the plaintiff had contracted for the purchase of the fee of certain property in ignorance of the fact that the vendor had only an estate *pur autre vie* with remainder in fee in his wife. Defendant having knowl-

edge of plaintiff's contract, took a conveyance in fee from the vendor in which the wife joined. The court held that plaintiff was entitled, by way of specific performance, to a conveyance by defendant of the vendor's life estate, with compensation for the wife's remainder in fee, which the vendor was unable to bind. In *Hartnett v. Yeilding*,¹⁴ defendant, a tenant for life, with power to make leases for 21 years at the best improved rent, made a lease to plaintiff, covenanting, for the term of his life, to renew said lease to plaintiff, his executors, administrators and assigns, by giving them a lease for 21 years when applied to. The court, Lord Redesdale, declined to enforce this contract, because, in view of the interests of the remainderman, it was unconscionable, both in the tenant for life and the purchaser. The plaintiff offered to take a lease for 21 years, etc., if the defendant shall so long live. Said the Lord Chancellor: "I think this is one of those cases where the plaintiff has no right to qualify the contract he insists upon; there is nothing in the case to show that satisfaction in the form of damages is not an adequate remedy for him. If he had been put into a situation from which he could not extricate himself, the defendant might be called on to make the best title in his power; but nothing can be more mischievous than to permit a person who knows that another has only a limited power to enter into a contract with that other person, which, if executed, would be a fraud on the power; and when that is objected to, to say 'I will take the best you can give me.' A court of equity ought to say to persons coming before it in such a way, 'make the best of your case with a jury.'"¹⁵ In *Lawrenson v. Butler*,¹⁶ it appeared that the parties entered into an agreement for a lease which was contrary to the provisions of the settlement under which the proposed lessor held. Other circumstances in the case showed a want of mutuality in the agreement. Though the complainant was willing to accept such lease as the defendant could make, the court dismissed his bill. *Collyer v. Clay*¹⁶ is not at all in point. There a trust fund was settled to the use of one for life, with remainder to two persons equally with a right of survivor-

⁹ Pom. Spec. Perf. § 442, *et seq.*

¹⁰ 26 N. J. Eq. 330.

¹¹ 73 Ill. 100.

¹² L. R. 5 Ch. 534.

¹³ L. R. 8 Eq. 424.

¹⁴ (Irish) 2 Sch. & Lef. 549.

¹⁵ 1 Sch. & Lef. 13.

¹⁶ 7 Beav. 188.

ship. One of the beneficiaries afterwards sold his reversionary interest, both he and the purchaser being in ignorance of the fact that the other beneficiary was at that time already dead. The court declined to enforce the contract, but gave the purchaser judgment for the amount paid for the reversion, with interest. *Mortlock v. Buller*¹⁷ is not strictly in point, though Lord Eldon's opinion does contain a dictum to the effect that "if a man, having a partial interest in an estate chooses to enter into a contract, representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that and to an abatement, and the court will not hear the objection of the vendor that the purchaser cannot have the whole." But this was said *arguendo*, and though an accurate statement of the general rule is not addressed to any issue in the case. Such are the cases cited by Pomeroy to support his text quoted above. It will be noted that some of them are hardly in point. In others the court declined to grant the discretionary relief of partial performance with compensation, either because the interests of innocent third parties would be unfavorably affected;¹⁸ or because to grant the relief would be to convey to the vendee an estate not contemplated by his purchase.¹⁹ In addition to the cases cited by Mr. Pomeroy, the following illustrate further the extent to which the purchasers' knowledge of the defect will deprive him of the right of compensation. Thus, in *Edwards v. Majoribanks*,²⁰ the owner in fee of an advowson, held by a good title and free from incumbrances, contracted to sell it to plaintiff. Nothing was said by either purchaser or vendor as to the income of the living, but before the sale was completed the purchaser discovered that the income of the living was

¹⁷ 10 Ves. 292.

¹⁸ *Peeler v. Levy*, 26 N. J. Eq. 390; *Franz v. Orton*, 75 Ill. 100; *Hartnett v. Yeliding* (Irish), 2 Sch. & Lef. 549; *Lawrence v. Butler*, 1 Sch. & Lef. 13.

¹⁹ *Castle v. Wilkinson*, L. R. 5 Ch. 534; *Mortlock v. Buller*, 10 Ves. 292.

²⁰ 3 De G. & J. 328; 1 Giff. 384; 7 H. L. Cas. 806.

charged with repayment of a sum of money borrowed from Queen Anne's Bounty for rebuilding the parsonage, of which charge the vendor was aware. The purchaser could easily have ascertained the fact of the charge before making the contract, as he did afterwards, by making inquiry of his own accord, at the office of Queen Anne's Bounty. The court granted him specific performance, but refused compensation. In *Melthorpe v. Holgate*,²¹ where a person seized in fee of an estate subject to the life estate therein of his mother, contracted to sell it to plaintiff who had no actual knowledge of her interest, it was held that the mother's residence on the property as tenant or occupier, was not such notice of her rights to the purchaser as would preclude him from his right of compensation in respect of the life interest. In *Grant v. Munt*²² there was a fraudulent misrepresentation of a latent defect in the premises, the dry-rot, which was not apparent upon examination, and the court held that the purchaser was entitled to compensation. In *King v. Wilson*²³ the premises were sold as being forty-six feet in depth, when in fact they were only thirty-three, and though the vendee was a tenant in possession, it was held not to be such negligence for him to rely upon the reiterated statement of the vendor's solicitor that there had been an admeasurement recently, and that there were forty-six feet, as to bar him from the right to compensation. The distinction between all these cases where the court has held the vendee entitled to have performance with compensation, and the case of a vendee who, with knowledge of an intervening loss by fire, sees fit, nevertheless, to perfect his contract by exercising his option is too obvious to require discussion. The vendor's undertaking in these cases where the property is destroyed by fire pending the option, does not come within that class of obligations which are released because a specific performance of them has become impossible; as, for instance, where a public hall is let for a musical entertainment on a future day, but is accidentally destroyed by fire before the day arrives, it has been held that the bargain is ended.²⁴ Such contracts more nearly resemble the case

²¹ 1 Coll. 204.

²² *Coop. Cas.* 173.

²³ 6 Beav. 124.

²⁴ *Taylor v. Caldwell*, 2 B. & S. 826.

of an undertaking to build a house on the land of another, which has been held not to be discharged by the destruction of the house by fire, when partially completed,²⁵ nor by the fact that when the building is completed the walls sink and crack in consequence of an imperfection in soil itself, necessitating the partial removal of the house and its rebuilding on artificial foundations;²⁶ or like the contract of a printer to supply a given number of copies of a book, which remains unfulfilled if, after a part of them are delivered, his premises with the rest are destroyed by fire.²⁷ The vendor's offer is to sell a certain lot and the house thereon. It cannot be said, with any propriety, that this undertaking is rendered impossible by the destruction of the house by fire.

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²⁵ Adams v. Nichols, 19 Pick. 275.

²⁶ Dermott v. Jones, 2 Wall. 1.

²⁷ Adler v. Booth, 7 Car. & P. 108.

BOUNDARIES—THREAD OF STREAM—SHORE LINE.

FREEMAN V. BELLEGARDE.

Supreme Court of California, July 18, 1895.

1. A description in a mortgage extending the boundary line of the mortgaged land from a given point, by certain courses and distances, "to the mouth" of a certain creek, and "thence ascending said creek" by certain courses and distances, made the thread of the creek the boundary line, regardless of the last named courses and distances, even though the creek was a tidal stream, the grantor having title to its bed.

2. A deed conveying land bordering on a stream, and defining its boundaries as "commencing at the intersection" of a certain ditch "with the shore line," and extending by courses and distances named to the "S. shore" of the same stream, "thence along said shore as it winds and turns, to commencement," made the shore line the boundary, and did not convey the land lying between the low-water mark and the thread of the stream.

HARRISON, J.; Action to quiet title to certain lands in San Francisco. The lands described in the complaint are a portion of the Bernal Rancho, and the controverted question in the action is the title of the plaintiffs to that portion of the lands described in the complaint which lies between the south shore of Islais creek and the thread of the stream. Islais creek empties into the Bay of San Francisco, and the tidal waters of the bay ebb and flow in the creek for some distance above its mouth. At the line of the land claimed by the plaintiff nearest the bay the creek is at ordinary high tides 300 feet wide, and the ground at that point that is covered and uncovered by the ebb and flow of the tides has a width of 150 feet be-

tween the bank of the stream and the line of ordinary low-water mark. At high tide the water nearest the bay is about 3 feet deep, and at a point below the lands in controversy there is at low tide no water in the creek, thus rendering the creek a mere basin which is filled and emptied by the ebb and flow of the tide. The patent for the Bernal Rancho covers the bed of Islais creek and the land on both banks thereof, and includes all the lands described in the complaint. The title of the plaintiffs to the land in controversy is derived through the foreclosure of a mortgage given by the Bernals to J. Mora Moss, and a subsequent conveyance from the grantees of Moss to John Hewston, and depends upon the construction to be given to the description in the mortgage and sheriff's deed thereunder, and to the description in the conveyance from Moss' grantees to Hewston. The plaintiffs had judgment in the court below, and defendants have appealed therefrom, and from an order denying a new trial.

1. The description of the property in the mortgage to Moss, so far as the same affects the present action, is as follows: " * * * Thence along margin of the bay (giving four courses and distances) * * * 11 chains to mouth of creek; thence ascending said creek (giving thirteen courses, with their distances) * * * N. 45 degrees, W. 9 chains, 50 links, crossing the creek to the end of the old wall on N. side of marsh, * * * containing area of 1,958 acres, more or less, according to a survey by N. Scholfield, deputy U. S. surveyor general." This description in the mortgage was carried into the sheriff's deed issued upon the sale under the foreclosure, and the title to the land thus conveyed afterwards became vested in Pioche and Robinson. In *Spring v. Hewston*, 52 Cal. 442, the description in this mortgage was before the court, and it was held that the creek, rather than the line determined by the courses and distances, was the true boundary of the land embraced in the mortgage. The call in the mortgage "to mouth of creek" rendered the thread of the creek the boundary of the land mortgaged. In the absence of any qualifying term, the designation in a conveyance of any physical object or monument as a boundary implies the middle or central point of such boundary, as, for example, if the boundary be a road or highway or a stream, the thread of the road or stream will be intended; if a rock, a heap of stones, or a tree be the boundary, the central point of such tree or rock or heap of stones will be intended. A private grant is to be interpreted in favor of the grantee, and, if the grantor is the owner of the monument or boundary designated in his grant, his conveyance will be held to extend to the middle line or central point of such monument or boundary. This rule is not changed by reason of the fact that a stream which is designated as the boundary is a tidal stream, if the grantor of the land is the owner of the bed of such stream. "When riparian estates are con-

veyed, the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters." Gould, *Waters*, § 195. The title to the beds of tidal streams is ordinarily vested in the sovereign, and in such case a grant from the sovereign which is bounded by tidal waters will be construed to extend only to high-water mark. *Water Co. v. Richardson*, 70 Cal. 206, 11 Pac. Rep. 695. A grant from the sovereign is to be interpreted in favor of the grantor, contrary to the rule for interpreting grants between private individuals; but if, as in the present case, the sovereign has parted with the title to the land beneath the stream, a grant of the riparian tidal lands by the owner must receive the same construction as a grant by him of any other riparian lands. It is unnecessary to determine whether the provisions of section 880, Civ. Code, and of section 2077, Code Civ. Proc., were intended to change the rules of construction then existing, inasmuch as the mortgage to Moss, and the conveyances by which the lands in question became vested in Ploche and Robinson, were executed prior to the enactment of the Codes. The further call in the mortgage and subsequent conveyances, "thence ascending said creek," must prevail over the courses and distances. The creek is the boundary of the land conveyed, and the courses and distances, being only approximate estimates of the direction and length of the boundary, must yield to the actual line of the creek. When a meandering stream is a boundary, it is impracticable for a surveyor to fix monuments in the channel of the water, or to define the actual line of its windings and courses; and in attempting to define its banks it would be impossible for two surveyors to give the courses and lengths of its several meanders alike. *Yates v. Van De Bogert*, 36 N. Y. 526; *Ang. Water-Courses*, §§ 29, 30; *Middleton v. Pritchard*, 3 Scam. 510; *Railroad Co. v. Schurmeir*, 7 Wall. 272. This construction is not overcome by the fact that, after "ascending the creek" for several courses, the next course is given as "crossing the creek to the end of the old wall." This call is not inconsistent with holding that the previous call, "ascending the creek," follows the thread of the stream, but merely shows that in going from that point the next course is in a direction which crosses the creek from the thread of the stream towards the end of the wall. Nor is the construction to be given to these calls in the mortgage qualified by the subsequent reference therein to a survey by Scholfield. The defendants offered in evidence a plat of a survey made by Scholfield and approved by the United States surveyor general September 23, 1853, and it was testified that this was a preliminary survey of the Bernal Rancho, made under instructions from the land commission. A comparison of this plat with the description in the mortgage shows, however, that this cannot have been the survey referred to in the mortgage. The plat is of the entire rancho, containing 4,341

acres, and has upon its face several subdivisions, no one of which corresponds with the tract of 1,958 acres which is described in the mortgage. The plat, however, contains upwards of 100 courses,—more than double the number in the mortgage,—and only 11 of these courses are the same as those in the mortgage.

2. Ploche and Robinson conveyed December 6, 1866, to John Hewston, a tract of land "commencing at the intersection of a ditch (dividing land of Haley and O'Neill) with the shore line, and running thence along said ditch * * * to E. line of 15th avenue; thence along the easterly line of said 15th avenue, N. 45 degrees, 15', W. 2 chains 60 links, to S. shore of Islais creek; thence along said shore, as it winds and turns, to commencement." Whatever title passed by this deed was vested in the plaintiffs at the commencement of the action. By virtue of conveyances subsequently executed by Ploche and Robinson, the defendants Luty and Thomas claimed title to the land, "commencing at a point where the northwesterly line of Fourth avenue intersects the southerly shore of Islais creek, and running thence in a northwesterly direction along the northeasterly line of said Fourth avenue, extended to the center of Islais creek; and thence ascending said Islais creek along the center line thereof to the northeasterly line of Fifteenth avenue, if extended in a northwesterly direction, as said avenue is delineated on said map; and thence in a southeasterly direction, and along the northeasterly line of Fifteenth avenue, if extended as aforesaid to the southerly shore of Islais creek; and thence in a northeasterly direction along said southerly shore, as it winds and turns, to the point of commencement." With reference to their title to this land the court finds "that the lands described in the conveyance to Hewston include all the property described in plaintiffs' complaint, unless such deed is to be construed as including no part of the lands covered by the waters of Islais creek, in which event the said deed includes all the lands described in plaintiffs' complaint, except that lying in Islais creek;" and "if Ploche and Robinson retained any title to any part of the lands described in plaintiffs' complaint, after the making of the conveyances hereinbefore set out, then such title thereafter, and prior to the commencement of this action, became vested in the defendants Thomas and Luty as to the lands described in their answer." The conclusion of law that "the plaintiffs are the owners of all the real property described in their complaint" must be regarded as a finding that Ploche and Robinson did not retain any title to any portion of the lands described in the complaint. The term "shore," in its ordinary use, signifies the land that is periodically covered and uncovered by the tide, but it is sometimes applied to a river or pond, as synonymous with bank. In the absence of any qualification, a grant bounded by the "shore" of a river, when the grantor is the owner of the river, conveys the land up to the lowest

point of the shore at any time, in order that the grantee may at all times have access to the stream by which the land is bounded. It is competent, however, for the grantor to so designate the line on the shore which shall constitute the boundary that there shall be no uncertainty in its location, and in such case the line of high or low-water mark would be immaterial in determining the extent of the grant. In the present case the starting point of the description in the grant to Hewston is "the intersection of the ditch with the shore line." This starting point may be susceptible of exact location, and from some of the evidence offered at the trial it would appear capable of ascertainment, although the court does not find its location. The only land of which plaintiffs have title is that embraced within a line drawn from this starting point, around the various courses, to the "south shore of Islais creek," and "thence along said shore, as it winds and turns, to commencement." The point in the "south shore," from which the last course is to be drawn, must be the same point in the shore as is the starting point; that is, at whatever point between high and low-water mark was the intersection of the ditch with the shore line, there must be the point in the "shore line" to which the course along the easterly line of Fifteenth avenue is to be extended. The term "shore" must be construed with the same meaning wherever it is used in the same conveyance, and its definite location in the first course requires the same location in the last. This is a fixed boundary or monument to which the distance "two chains, sixty links," must yield. Whatever land lies between this boundary and the center of the creek is vested in the defendants Thomas and Luty, and the finding of the court that the plaintiffs were the owners of this portion of the demanded premises was erroneous.

3. The defendants other than Thomas and Luty claim title under Harvey S. Brown to certain lots in gift map No. 4, upon the theory that the Moss mortgage did not include any part of the bed of Islais creek. As Brown had conveyed to Moss all the lands described in the mortgage before he made the conveyance under which these defendants claim, it is evident that the plaintiffs' title, derived from Moss, is superior to theirs.

The judgment and order denying a new trial are reversed as to the appellants Thomas and Luty. As to the other appellants they are affirmed.

NOTE.—Boundaries.—In all deeds, mortgages and kindred instruments conveying or agreeing to convey land, there is, of course, a necessity for an accurate designation of the boundaries of the land conveyed. In order to arrive at a correct conclusion in such matters it is often necessary for courts to resort to the known rules of construction which from experience have been found necessary and right, and which have practically grown into maxims of the law. It will not be amiss therefore to preface this note with some of these controlling canons of construction. All deeds shall be construed favorably and as near the intention of the parties as possible, consistent with the rules of law. The construction should be put on the entire

deed, and every part of it. For the whole deed ought to stand together if practicable, and every sentence and word of it be made to operate and take effect. If two clauses in a deed stand in irreconcilable contradiction to each other, the first clause shall prevail and the latter shall be regarded as inoperative. The law will construe that part of a deed to precede which ought to take precedence no matter in what part of the instrument it may be found. All deeds shall be taken most strongly against the grantor. For the principle of self-interest will make men sufficiently careful not to prejudice themselves or their rights by using words or terms of too general or extensive a signification. The most general and usual terms of description employed in deeds to ascertain the thing granted are: 1st, quantity; 2nd, course and distance; 3rd, artificial or natural objects and monuments. *Doe v. Porter*, 3 Ark. 18, 56, 57; *Bolton v. Lann*, 16 Tex. 96, 110. The theory of the law is that those particulars are to be regarded in which error is least likely to occur. *Morrow v. Whitney*, 95 U. S. 551. It is generally held that the construction of a deed is a question of law for the court and cannot be left to a jury. That though it is the province of the jury to say where boundaries named in a deed are located, still it is the exclusive province of the court to declare what the boundaries are that control the location. *Doe v. Paine & Sawyer*, 4 Hawks (N. C.), 64. Expressed in other words: "What are boundaries is matter of law, where they are, is matter of fact?" *Bolton v. Lann*, 16 Tex. 96, 110. See, also, *Delvin, Deeds*, Sec. 1034; *Rathbun v. Geer*, 64 Conn. 421, 30 Atl. Rep. 60; *Northrop v. Sumney*, 27 Barb. 196. It is the duty of the court to say what are the first, to the end that the jury may arrive at a correct conclusion as to the second. Where natural objects are called for as the termini or boundaries, and course and distance and marked lines are also given, the natural objects will prevail as the termini, and course and distance may be resorted to by the jury only for the purpose of ascertaining the natural objects. Course and distance simply play the part of pointers or guides to the natural objects. They direct the searcher for the true boundary where to look for the same, which, being ascertained, either by the assistance of the directions given by the course and distance or otherwise, must control and shorten or lengthen the distance as required to arrive at the correct boundary. *Doe v. Paine & Sawyer*, 4 Hawks (N. C.), 64; *McIvers v. Walker*, 9 Cranch, 173; *Lessee of Croghan v. Nelson*, 3 How. 187, 193; *Doe v. Porter*, 3 Ark. 18; *Preston v. Bomar*, 6 Wheat. 581; *Bartlett v. Saunders*, 13 Otto, 316; *Cummings v. Browne*, 61 Iowa, 385, 16 N. W. Rep. 280; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Curtiss v. Aaronson*, 49 N. J. L. 68, 7 Atl. Rep. 886; *McAnich v. Freeman*, 60 Tex. 445, 4 S. W. Rep. 369; *Beaudry v. Doyle*, 68 Cal. 105, 8 Pac. Rep. 694; *Worsham v. Chism* (Tex. Civ. App.), 28 S. W. Rep. 905; *Worsham v. Morgan* (Tex. Civ. App.), 28 S. W. Rep. 918; *Coughran v. Alderete* (Tex. Civ. App.), 26 S. W. Rep. 109; *Smith v. Catlin Co.*, 117 Mo. 438, 22 S. W. Rep. 1083; *Albert v. Thomas*, 73 Md. 181, 20 Atl. Rep. 912; *Olson v. Keith* (Mass.), 39 N. E. Rep. 410; *Richwine v. Jones* (Ind.), 39 N. E. Rep. 460; *Peterson v. Skjelver* (Neb.), 62 N. W. Rep. 43; *Logan v. Evans* (Ky.), 29 S. W. Rep. 636. So, where the line of another tract of land is called for in a deed as a boundary, the line must be run to regardless of distance whether greater or less. *Cansler v. Fite*, 5 Jones (N. C.), 424. And this is true even though the line of the other tract of land called for is not marked or designated and may require a survey to be estab-

lished. *Corn v. McCrary*, 3 Jones (N. C.), 496. When the monuments called for cannot be certainly identified or found from the description, the field notes and plats of the original government survey may be resorted to in order to show the true line. *Peterson v. Skjelver* (Neb.), 62 N. W. Rep. 43. But if the original monuments established by the government survey can be unquestionably identified without the aid of the field notes they will control the boundary, though the field notes be at variance with the monuments according to their true location. *Id.* *Woods v. West*, 40 Neb. 307, 58 N. W. Rep. 938; *Thompson v. Harris*, 40 Neb. 230, 58 N. W. Rep. 712. And where the field notes are inconsistent with the survey the true description may be shown by the evidence of the surveyor by whom the lines were established. *Schley v. Blum* (Tex. Civ. App.), 22 S. W. Rep. 264. The rule is that quantity will yield to the bound ary lines and these must give way to fixed and ascertained objects. The courts will always apply the rules of construction in determining the true location of boundaries. The distance from one known and established object whether natural or artificial is not so certain or easily ascertained as a boundary as is a simple recital that the boundary is a line running from one object to another. A line running, for instance, from a certain designated tree or other object to a similar object or to the middle of a stream or its margin at a low-water mark, etc., is more easily ascertained than would be the case if the distance from one of these objects to the other should be relied on to extend the line from one object to the other and no further. If the distance should carry the line either beyond the objective monument or not to it, it is clear that a boundary thus ascertained would not be as definite or certain as would the line from one object directly to another. *Richwine v. Jones* (Ind. App.), 39 N. E. Rep. 460; *Silver Creek Cement Corp. v. Union L. & C. Co.* (Ind.), 35 N. E. Rep. 125. Where the channel of a stream is mentioned as a boundary line it will be construed to be the center of the main volume of water and not the channel of the deepest portion as considered from a standpoint of navigation. *Dunliuth & Dubuque Bridge Co. v. Dubuque Co.*, 55 Iowa, 558, 8 N. W. Rep. 443. The general rule where land is bounded on a water-way, whether a river large or small or an ocean, and the description calls for the margin of the water as the boundary, this will carry the grant to low-water or low-tide mark. *Babson v. Tawter*, 79 Me. 368, 10 Atl. Rep. 63. And when the grantee takes to the bank of a stream his boundary will follow the encroachments or receding of the stream. It will not be fixed for all time at the identical line of the low-water mark at the precise time of the grant, but the boundary must yield from time to time to the natural changes in the banks brought about by natural causes whether such changes take away from or add to the body of land as originally conveyed. *Id.* *Nixon v. Walter*, 41 N. J. Eq. 103, 3 Atl. Rep. 385. But this rule does not apply where, from extraordinary causes, a large portion of land bordering on water, and especially a large body of water, is swept away by an unusual disturbance of the elements or like cause. It is necessary that the change in the location of low-water mark be slow and gradual. It is the practically imperceptible wearing away of the banks or their encroachment on the water that carries with such changes the boundaries which would otherwise remain stationary and fixed. *Mulroy v. Norton*, 100 N. Y. 424, 3 N. E. Rep. 581. And if land suddenly destroyed and taken away be reformed by accretion within the boundaries as existing before such de-

struction, the new land thus formed will become a part of the tract which bordered at low-tide before the sudden and extraordinary change was made, and will belong to the owner thereof just as though conveyed expressly by deed. *Id.* Where the description distinctly calls for the high-water mark as a boundary of the land conveyed, the boundary thus designated will be construed as a fixed line at the date of the grant and the subsequent receding or encroachment of the water changing the high-water mark will not affect or in any way alter the boundary thus definitely established. *Nixon v. Walter et al.*, 41 N. J. Eq. 103, 3 Atl. Rep. 385. Where a description calls for a fixed and ascertainable point on a stream and thence "up the same" to another fixed boundary, such description will be construed to mean in a straight line to such object, and not according to the meanderings of the stream, unless the description affirmatively call for a line along the banks of such stream, or words that would indicate that the line should be according to the meanderings of the stream. *Wharton v. Brick*, 49 N. J. L. 289, 8 Atl. Rep. 529. So where a description calls for a point in the bed of the stream and thence with the meander of the stream to another point or object the boundary will follow the meanderings of the stream. *Turner v. Parker*, 14 Or. 340, 12 Pac. Rep. 495. And a description naming from one object to another on the stream, will be held to follow the meander of the stream as the correct boundary. *Rayburn v. Winant*, 16 Or. 318, 18 Pac. Rep. 588. And the like conclusion is reach where the description is "meandering down the right bank" of the river. *Heilbron v. King River & F. C. Co.*, 76 Cal. 8, 17 Pac. 933. And the rule is, where lands patented by the general government under the acts of congress governing the survey and sale of public lands are bordered on a stream, either navigable or not navigable, are not limited by the meander lines; but the boundary must stop at the stream. *The St. & Pac. R. R. Co. v. Schurmeier*, 7 Wall. 272; *St. Paul & T. F. R. R. Co. v. First Div. St. Paul & P. R. Co.*, 26 Minn. 31, 49 N. W. Rep. 303. And when patents to land bordering on streams and water-courses are issued by the government without reservation or restriction they will be governed as to the boundaries by the laws of the State in which the land is situated. And where land so patented in a State where the common law is in force borders on a lake, the grantee from the United States will take to the middle of such lake. *Hardin v. Jordan*, 140 U. S. 371; *Lamprey v. Metcalf*, 52 Minn. 181, 53 N. W. Rep. 1139. But if the patent expressly bounds the land conveyed on the bank of a water-course, this is, in effect, a reservation of any of the land beyond the border of the stream or water-course, and the grantee will only take to the margin thereof. *Packer v. Bird*, 137 U. S. 661. Where land is bounded on the sea the rule is that the line of boundary extends only to high-water mark. *Brown v. Heard*, 85 Me. 294, 27 Atl. Rep. 182; *Oakes v. DeLancey*, 133 N. Y. 227, 30 N. E. Rep. 974. But if, in order to make the distances and acreage called for in the deed agree with the boundary on the sea, it becomes necessary to adopt a boundary at low-water mark instead of high-water mark as is the usual rule, this will be done, and the line at low-water mark will control. *Oakes v. DeLancey*, 133 N. Y. 227, 30 N. E. Rep. 974. Where the word "adjoining" is used in the descriptive part of a conveyance, it will be held to mean next to and bounding on the object or thing adjoined, and the idea of any intervening space is necessarily excluded. So, in a deed which calls for a certain tract of land "adjoining" and "bounded on" the Atlantic ocean, it will be held that

the land bounded by the ocean extends to ordinary high-water mark, and the grantee will take to such mark with all the privileges of ownership on tidal waters. *Yard v. Ocean Beach Ass'n*, 49 N. J. Eq. 306, 24 Atl. Rep. 729. Where lands are bounded on inland water courses, such as lakes, rivers, etc., the criterion for ascertaining just where a call in a description to such lake, river, etc., would establish the line must be determined by first ascertaining whether the body of water bounded be a navigable or non-navigable stream or body. If the body of water be not navigable, such a description will carry the fee to the center; if navigable, only to the water line. The waters of all navigable streams belong to the State in its sovereign capacity and a riparian owner will not be permitted to assert absolute dominion over a body of navigable water which might be to the extent of obstructing navigation or otherwise invading the rights and privileges of the citizens of the State at large. But the grantee would take to the margin with all the privileges incident to riparian ownership. *Lamprey v. Metcalf*, 52 Minn. 181, 53 N. W. Rep. 1039. See, to like effect, *Gouveneur v. Ice Co.* (N. Y.), 31 N. E. Rep. 865; *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. Rep. 686. Where a description calls for a line to a street or alley, it will be held that the fee in the land will pass to the center of the street, alley, etc., if the grantor owned to such center, subject, of course, to the right of the public to use same as a highway. *Schneider v. Jacob*, 86 Ky. 101, 5 S. W. Rep. 350; *Kohler v. Kleppinger*, 5 Atl. Rep. 750; *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104, 1 South. Rep. 512; *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51, 6 N. E. Rep. 531; *Kneeland v. Van Valkenburg*, 46 Wis. 434, 1 N. W. Rep. 63; *In re Application of Robbins* (Minn.), 24 N. W. Rep. 356; *Ott v. Kreiter*, 110 Pa. St. 370, 1 Atl. Rep. 724; *Wellman v. Dickey*, 78 Me. 29, 2 Atl. Rep. 133; *Ayers v. Pennsylvania R. Co.*, 48 N. J. L. 44, 3 Atl. Rep. 885; *Gould v. Eastern R. Co.*, 142 Mass. 85, 7 N. E. Rep. 543; *Jarstad v. Morgan*, 48 Wis. 245, 4 N. W. Rep. 27; *C. & W. Ry. Co. v. Witheron*, 82 Ala. 190, 3 South. Rep. 23; *Watkins v. Lynch*, 71 Cal. 21, 11 Pac. Rep. 808; *Hennesse v. Murdock*, 137 N. Y. 317, 33 N. E. Rep. 330; *Warbrighton v. Demorett*, 129 Ind. 346, 27 N. E. Rep. 730; *Sylvre v. McCool*, 86 Ga. 1, 12 S. E. Rep. 175; *Jacob v. Woolfolk* (Ky.), 14 S. W. Rep. 415. And the fee of the grantee to the center will, of course, continue after the street may be abandoned for public uses. *Ott v. Kreiter*, 110 Pa. St. 370, 1 Atl. Rep. 724. And where one plats his land adjoining another with a street wholly on his own land which he lays off into lots and blocks, a conveyance of one of these lots or blocks described as bounded on such street will vest the fee in the grantee the full width of the street to the land of the adjoining owner. *In re Application of Robbins* (Minn.), 24 N. W. Rep. 356. But where land is described as bounded on the border line of a street or alley, the fee will not pass to the center, but only to the border line of the highway and no further. *Alameda Macadamizing Co. v. Williams*, 70 Cal. 534, 12 Pac. Rep. 530; *Hunt v. Brown*, 75 Md. 481, 23 Atl. Rep. 1029. Where a deed contained this description, "beginning at a point on the east side of the Bloomingdale road aforesaid . . . and runs thence north . . . along the east side of said road" a certain number of feet and the description is continued until the line is brought to the point of beginning, it was held that no part of the road-bed passed by the grant. *Blackman v. Riley*, 130 N. Y. 318, 34 N. E. Rep. 214. Likewise in a deed the description in which called for a line "thence running east 45 degrees north across the road leading to Pen-

dell's Ferry; thence by said road on the easterly and northerly side thereof," etc., it was held that the side and not the center of the road was the boundary. *Holmes v. Turner Falls Co.*, 142 Mass. 590, 8 N. E. Rep. 646. See, also, *Chadwick v. Davis*, 143 Mass. 7, where a similar rule is announced.

W. C. RODGERS.

Nashville, Ark.

JETSAM AND FLOTSAM.

CORPORATIONS OF SEVERAL STATES—THEIR LEGAL STATUS.

Railroad corporations often receive corporate paternity by being chartered in two or more States. The status of such a company is only affected territorially and not extraterritorially and the legislation of either State cannot affect the corporation when doing business away from its home State. Two States, in the language of Judge Breese in *Quincy Bridge Co. v. Adams Co.*, 88 Ill. 615, cannot so fuse themselves into a single sovereignty as to unite in passing a legislative act to create a body politic of two or more States as a corporate entity of two or more States. This question has again been thoroughly discussed by the 8th Circuit Court of Appeals in *Missouri Pac. Ry. Co. v. Meck*, 69 Fed. Rep. 753. The Missouri Pac. Ry. Co. was chartered by the States of Kansas, Nebraska, Missouri. The corporation being sued in Kansas for personal injuries, the question of diverse citizenship was raised (even after pleading to the merits) and the trial court decided erroneously that the action could be brought; but this judgment was reversed and the corporation treated as a domestic corporation, incapable of being sued by one of its own citizens. In *Chi. & N. W. R. Co. v. Auditor*, 53 Mich. 91, Judge Cooley tersely stated the proposition thus: "It is impossible to conceive of one joint act performed simultaneously by two sovereign States, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created, but when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered possesses, and succeeds there to its privileges."

The general rule deducible from decided cases is this: Whenever a corporation of one State by legislative sanction, becomes also a corporation of another State, either by the process of consolidation or otherwise, whatever acts it subsequently performs or does in the latter State, it does and performs as a domestic, and not as a foreign corporation. It derives all its powers to act as a corporation in the State of its adoption from local laws. Where there sued for an act done within the State, it is suable and answerable as a domestic and not as a foreign corporation.—*National Corporation Reporter*.

MISTAKE OF LAW.

In a recent article, under this heading, in the *New Jersey Law Journal*, it seems to be assumed that no relief can be obtained from a mistake of law, disconnected from fraud, citing the case of *Wintermute v. Snyder*, 3 N. J. Eq. 489, and observing: "In New York, neither on the law nor equity side of the court can relief be obtained from a mistake of law. *Vanderbeck v. Rochester*, 122 N. Y. 285, is a good case on the subject." That case hardly warrants that conclu-

sion. It simply decided that a voluntary payment of an assessment, made under a mistake of law, and not induced by any fraud or improper conduct on the part of the payee, cannot be recalled. The law on the subject is thus laid down in *Browne on Parol Evidence*, Section 44: "Equity will generally relieve either party against a mutual mistake of law affecting the written expression of their agreement, but not against a unilateral mistake of law unless the mistake was brought about by, or known to the other party; and not against a mutual or a unilateral mistake respecting the general law on the subject of their agreement." In *Adsit v. Adsit*, 2 Johns. Ch. 448, Kent thought that a widow's acceptance of a legacy in lieu of dower, under the mistaken impression that by terms of the will an acceptance waived her dower, would not estop her from claiming dower. So in *Evan's Appeal*, 51 Conn. 435. Mr. Pomeroy treats the topic learnedly in 2 Eq. Jur. §§ 845, 846, 849. The New York doctrine is admirably explained by Earl, Com'rs, in *Pitcher v. Hennessy*, 48 N. Y. 415, which we think supports Mr. Browne's rule, and it also finds clear support in *Dinwiddie v. Self*, 145 Illinois, 290; *Lee v. Percival*, 85 Iowa, 639; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816; *Parker v. Parker*, 88 Ala. 362, 16 Am. St. Rep. 62; *Griffith v. Townley*, 69 Mo. 13, 33 Am. St. Rep. 476; *March v. McNair*, 48 Hun, 117; *Park Bros. & Co., Limited v. Blodgett & Clapp Co.*, 64 Conn. 28; *Goode v. Riley*, 153 Mass. 585. The writer in the *New Jersey Law Journal* admits that the law is different in England, and in some of the States, in the case of mutual mistake of law. The subject is rather difficult, and not free from obscurity, and affords a field for development of the law, and the adoption of a more reasonable and practical rule than the idea that every citizen is presumed to know the law, when not only does no lay citizen know it, but no lawyer and no judge knows it.—*Chicago Law Journal*.

CORRESPONDENCE.

LIEN OF JUDGMENT APPEALED FROM AND DISMISSED.

To the Editor of the Central Law Journal:

In Missouri, Smith obtained a judgment in a justice's court against Jones for \$100. On the same day Jones filed his bond and affidavit for appeal. The bond was approved by the justice and the appeal allowed. When the case reached the Circuit Court fifteen days later Smith filed a motion to require Jones to give an additional bond on the ground that the principal and surety in the bond approved by the justice were insolvent. The motion was sustained and Jones was required to give additional bond on or before the next term. At the next term, Jones having failed to comply with the order, his appeal, at the request of Smith, was dismissed by the court. Five days after obtaining the judgment before the justice Smith filed a transcript of the judgment in the circuit clerk's office of the proper county. Eight days after this and several months before the dismissal of the appeal Jones sold a large tract of land lying in the same county to Brown for \$5000.

Query: Is the land in Brown's hands subject to the payment of Smith's judgment. O. M. B.

BOOKS RECEIVED.

A Treatise on Land Titles in the United States. By Lewis N. Dembitz of the Louisville Bar. Author of a Treatise on Kentucky Jurisprudence. Vols. 1 and 2. St. Paul, Minn. West Publishing Co. 1895.

American Negligence Cases (Cited Am. Neg. Cas.) A Complete Collection of all Reported Negligence Cases decided in the United States Supreme Court, the United States Circuit Courts of Appeals, all the United States Circuit and District Courts, and the Courts of Last Resort of all the States and Territories, from the Earliest Times, with Selections from the Intermediate Courts. Topically Arranged with notes of English Cases and Annotations. Prepared and Edited by T. F. Hamilton, of the New York Bar. Vol. 1. New York. Remick, Schilling & Co. 1895.

WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCOUNTING—Dismissal after Reference.—In the absence of a plea or answer by the defendant claiming affirmative relief as against the plaintiff, the latter may, in vacation, dismiss his equitable petition for a general accounting, even though prior to such dismissal the matters of account involved had been referred to and were in process of determination by an auditor.—*JACKSON V. ROANE*, Ga., 28 S. E. Rep. 118.

2. ACTION FOR WRONGFUL EVICTION—Probable Cause.—Where one owning real estate sues out in due and legal form a dispossessionary warrant against another who entered as the tenant of a prior owner, and the warrant, in the absence of a counter affidavit and bond, is, by a proper officer, duly executed, and the tenant evicted, the latter cannot, unless the warrant was sued out with malice and without probable cause, maintain against the plaintiff in the dispossessionary warrant an action for damages to or destruction of his business thus occasioned, there being no direct contractual relation between himself and such plaintiff.—*PORTER V. JOHNSON*, Ga., 28 S. E. Rep. 123.

3. ADMINISTRATION—Claims against Decedent's Estate.—Claims against the estate of a deceased person must be sworn to by the claimants, and affidavits made, showing what amounts, if any, have been paid, and any debts due from claimants to the estate.—*BROWN V. BROWN*, S. Car., 28 S. E. Rep. 137.

4. ADMINISTRATION—Power of Administrator to Extend Payment.—Where, after conveyance of land, the grantor, on being sued for part of the land conveyed, contracts to indemnify the grantee for any of the land lost to him through the suit, and, pending the suit, the grantor dies, the extension by his administratrix of purchase notes given by the grantee "in consequence of the pendency" of the suit will not bind the estate.—*MADDOCK V. RUSSELL*, Cal., 42 Pac. Rep. 139.

5. ADMINISTRATION—Removal of Executor—Appointment.—After letters testamentary have issued to an executor, the clerk of the superior court cannot, upon

the filing of a caveat, remove such executor, and appoint a collector for the estate, without a hearing, as his authority under Code, § 2160, is limited to the issuance of an order staying all further proceedings except the preservation of the property and the collection of the debts until a decision of the issue is had.—*IN RE PALMER'S WILL*, N. Car., 23 S. E. Rep. 104.

6. **ADMINISTRATION—Sale of Decedent's Land.**—Sales of land by an executor under a decree of the chancery court are judicial sales, and are not complete until confirmed by the court; and the bidder is not entitled to possession until such confirmation.—*MAYNARD V. COCKE*, Miss., 18 South. Rep. 374.

7. **ADMIRALTY—Maritime Liens—Supplies and Materials.**—Persons having the entire possession of a vessel, under a contract of purchase, and using her for the transportation of merchandise and passengers, are to be regarded as her owners, so that the port of their residence will be her home port, notwithstanding that, by the contract of sale, title was not to pass until full payment of the purchase money, and that the vessel was still enrolled at the port of the sellers.—*THE SHREWSBURY*, U. S. D. C. (Ohio.), 69 Fed. Rep. 1017.

8. **ADMIRALTY—Maritime Liens—Waiver.**—A maritime lien is waived by accepting notes or other securities extending the time of payment beyond the time within which, by the general maritime law or by statute, the lienor is allowed to enforce the lien.—*THE NEBRASKA*, U. S. C. C. of App., 69 Fed. Rep. 1009.

9. **ADMIRALTY JURISDICTION—Floating Pile Driver.**—A pile driver consisting of a floating platform, carrying a derrick, engine, and pile-driving apparatus, and also furnished with a wheel by which it may propel itself about the bay or harbor, from one place of work to another, and which in its present condition is not fitted for purposes of transportation, is not a subject of admiralty jurisdiction; and contracts to furnish it with supplies are not maritime contracts enforceable in the admiralty.—*PILE DRIVER E. O. A.*, U. S. D. C. (Mich.), 69 Fed. Rep. 1005.

10. **APPEAL—Lost Record.**—An appeal will be dismissed for failure of appellant to file the abstract of the record required by the rules of the court, though part of the record has been lost; appellant having failed to take measures within a reasonable time to supply the part lost.—*CLOSE V. CLOSE*, Oreg., 42 Pac. Rep. 128.

11. **APPEAL FROM INFERIOR COURTS—Notice.**—Under Act 1885, p. 158, providing that appeals from the county to the district court must be taken within 10 days after final judgment, unless the court within the time limited extends the time for perfecting the appeal, the service of notice of appeal within the required time is essential to the jurisdiction of the district court, though a motion for a new trial is not disposed of within such time.—*SLATTERY V. ROBINSON*, Colo., 42 Pac. Rep. 179.

12. **BANKING—Savings and Loan Associations.**—Pol. Code, § 3617, provides that demands due on account of money deposited with savings and loan corporations shall, for taxation purposes, be treated as an interest in the property, and shall not be assessed to the owner thereof: Held, that a corporation authorized by its charter to do a general loan and trust business, but which also conducted a "savings department," and paid a stipulated rate of interest on deposits in that department, though the depositor did not otherwise participate in the corporation's earnings, was subject to taxation on the amount deposited in said department.—*CITY OF LOS ANGELES V. STATE LOAN & TRUST CO.*, Cal., 42 Pac. Rep. 149.

13. **CARRIERS—Passengers—Negligence.**—In an action against a carrier for death of a person pushed by its employee from its train, evidence that he had a railroad ticket, entitling him, on its face, to ride on the train, is admissible without evidence that it was purchased or owned by him, or that he boarded the train pursuant to it.—*SHARER V. FAXSON*, Penn., 33 Atl. Rep. 120.

14. **CLERKS OF COURT—Statute of Limitations.**—The statute of limitations begins to run against the cause of action given by Code, § 433, in favor of a judgment creditor against a clerk of court for failure to properly index the judgment, on the expiration of the clerk's term of office.—*SHACKELFORD V. STATON*, N. Car., 23 S. E. Rep. 101.

15. **CONSTITUTIONAL LAW—Jurisdiction of Federal Courts.**—The equity jurisdiction of the federal courts cannot take cognizance of a suit by a colored person, on behalf of himself and others similarly situated, against the officers of the State of which he and such others are citizens, to restrain such officers from acting under a statute of that State, claimed to violate Amend. Const. U. S. arts. 14, 15, by abridging or denying his right to vote, since he has an adequate remedy at law.—*GOWDY V. GREEN*, U. S. C. C. (S. Car.), 69 Fed. Rep. 865.

16. **CONSTITUTIONAL LAW—Reduction of Officer's Salary.**—Act March 6, 1891, reducing the salary of the clerk of the district court from that allowed by the law in existence at the time of his election, which was the same as allowed under the territorial legislature, does not violate Const. Schedule, § 5, providing that clerks of the district courts, "until otherwise provided by law," shall be entitled to the same fees as are now provided by law for clerks of the district courts of the territory.—*CLARK V. BOARD OF COM'RS OF SILVER BOW COUNTY*, Mont., 42 Pac. Rep. 104.

17. **CONSTITUTIONAL LAW—Taxation—Contract.**—A statute authorizing the levy of taxes for a special purpose enters into and becomes a part of the contract made thereunder, and a subsequent repealing act without a saving clause is void as impairing the obligation of a contract, in violation of Const. U. S. art. 1, § 10.—*MC CLELLAN V. MEEKINS*, N. Car., 23 S. E. Rep. 99.

18. **CONTRACT—Breach—Measure of Damages.**—In an action for breach of a contract to form a partnership, whereby plaintiff was to contribute her labor as against a henery plant to be furnished by defendant, evidence of the *per diem* value of plaintiff's services, while awaiting the completion by defendant of his agreement, cannot be considered in estimating the damages.—*ROCKWELL STOCK & LAND CO. V. CASTRONI*, Colo., 42 Pac. Rep. 180.

19. **CONTRACT—Damages—Recovery of Lost Profits.**—In an action by a boarding house keeper against a grocer for breach of a contract to furnish groceries on credit, whereby plaintiff was unable to take boarders who applied for board, testimony of plaintiff, who had been keeping boarders for 20 years, that if she had had sufficient groceries to have taken the boarders who applied for board she could have run the house at a certain profit, whereas the business was run at a loss, is sufficient to authorize a recovery for profits, as it will be presumed that persons offering to board with plaintiff would have remained with her.—*GOLDHAMER V. DYER*, Colo., 42 Pac. Rep. 177.

20. **CONTRACTS—Recovery for Part Performance.**—One who makes an entire contract, and willfully defaults in a substantial performance thereof, cannot recover for a part performance, though the other party was not damaged by the default.—*HARTMAN V. MEIGHAN*, Penn., 33 Atl. Rep. 123.

21. **CRIMINAL EVIDENCE—Criminal Law—Best and Secondary.**—Where upon the trial of a criminal case, it appears from a question asked a witness that his answer must disclose his knowledge of the contents of a bill of indictment, which is a part of a record of another case, the answer was properly excluded; the indictment itself being the best evidence.—*SAXON V. STATE*, Ga., 23 S. E. Rep. 116.

22. **CRIMINAL LAW—Larceny—Indictment.**—An information for larceny alleging that the property taken belonged to a corporation, and that such property, when taken, was in the possession of receivers appointed by a federal court states an offense against the State.—*STATE V. COSS*, Wash., 42 Pac. Rep. 127.

23. **CRIMINAL LAW—Withdrawal of Case from Jury.**—It is only when no aspect of the evidence would reasonably warrant the jury in making the inference that defendant is guilty that the case should be withdrawn from the jury.—*STATE V. GREEN*, N. Car., 28 S. E. Rep. 98.

24. **CRIMINAL PRACTICE—Indictment—Joinder of Offenses.**—Under Rev. St. § 1024, providing that where there are several charges against a person for the same act, or for two or more acts connected together, or for two or more acts of the same class of crimes, which may be properly joined, the whole may be joined in one indictment in separate counts, an indictment may contain a count under section 5456 referring to the felonious taking away by any one of anything belonging to the United States, from any place, and a count under section 5460, referring to the felonious taking and embezzlement of the metals at the United States mint by a person to whose charge they were committed; and it is immaterial that one might be classed as larceny, and the other as embezzlement, or that the punishment is different.—*UNITED STATES V. JONES*, U. S. D. C. (Nev.), 69 Fed. Rep. 973.

25. **CRIMINAL PRACTICE—National Banks—Receiving Deposits While Insolvent.**—An indictment under a statute declaring it an offense if an officer of a bank shall receive a deposit, "knowing, or having good reason to believe, the establishment to be insolvent," is not sufficient where it does not allege the insolvency, but merely follows the words of the statute, as there would be no offense if the bank was not insolvent, though the officer believed it was.—*STATE V. BARDWELL*, Miss., 18 South. Rep. 377.

26. **DEATH BY WRONGFUL ACT—Statute of Limitations.**—Code 1892, ch. 83, § 2746, which contains a saving clause in favor of infants "in any of the personal actions before mentioned," applies only to actions mentioned in that chapter, and therefore an action by an infant for the death of its father, given by section 663 of chapter 21, must be brought within one year after the death of the decedent, as required, though the infant at the time is not represented by any guardian, etc.—*FOSTER V. YAZOO & M. V. R. Co.*, Miss., 18 South. Rep. 380.

27. **DEED—Acknowledgment.**—Where a conveyance is made to a trustee, with power of sale for the payment of debts, such trustee is disqualified, as any other grantee would be, to take the acknowledgment of the grantor.—*HOLDEN V. BRIMAGE*, Miss., 18 South. Rep. 883.

28. **DEED—Easements.**—An easement that is strictly appurtenant to other land of the grantor is incapable of existence separate and apart from the particular land to which it is annexed, there being nothing for it to rest upon. But an easement that is not appurtenant to other land, such as may be held or conveyed independently by the owner of it, and without reference to other land of the grantor, may be regarded as a right or interest capable of being transmitted by deed.—*RING V. WALKER*, Me., 33 Atl. Rep. 174.

29. **EQUITY—Jurisdiction.**—Complainant, the holder of a judgment against a drainage district of Illinois, recovered upon its bonds and coupons, brought suit against the district and the commissioners and treasurer thereof, alleging that the commissioners had collected assessments, and failed to apply them on complainant's judgment; that they had received in payment of assessments coupons cut from bonds held by parties who had consented to a compromise agreement, and bought below par; and that the commissioners were chargeable with considerable sums collected,—this allegation being based on the theory that coupons re-received for taxes were to be treated as cash. The bill prayed that the commissioners be held personally responsible for taxes discharged under their direction, and enjoined from receiving anything but money for taxes: Held, that the bill should be dismissed, since, if there was any personal liability of the commissioners, there was an adequate remedy at

law, and that, for the failure to collect the taxes in money, the remedy was *mandamus*.—*COQUARD V. INDIAN GRAVE DRAINAGE DIST.*, U. S. C. C. of App., 69 Fed. Rep. 867.

30. **EQUITY—Jurisdiction—Public Land.**—Equity has jurisdiction of a bill brought by the United States, as trustee for the Indians to whom lands have been allotted in severalty, pursuant to the treaties and acts of congress providing that the United States will hold the land so allotted in trust for the benefit of the allottees, against persons who have illegally secured leases of such lands and taken possession thereof,—such bill seeking to oust such intruders, and to restrain them from inducing the Indians to make further leases, and from interfering with the Indian agent in the performance of his duties,—since the remedy by action of ejectment, even if such action could be maintained, would be inadequate.—*UNITED STATES V. FLOURNOY LIVE STOCK & REAL ESTATE CO.*, U. S. C. C. (Neb.), 69 Fed. Rep. 886.

31. **FEDERAL COURTS—Circuit Court of Appeals.**—The mere fact that the validity of a State law under the constitution of the United States is drawn in question will not, of itself, deprive the circuit court of appeals of jurisdiction to decide other questions involved in the case, although the judiciary act of March 3, 1891, provides, in section 5, for direct appeals from the circuit to the Supreme Court, when constitutional questions are involved. And, if it appears that the case may be disposed of upon grounds independent of the constitutional question, the court will take jurisdiction, and dispose of it accordingly: Held, therefore, that where, on appeal from an interlocutory injunction, it appeared that, while the bill challenged the constitutionality of a State law, the further question was also raised whether the case was one of equitable cognizance, the court would take jurisdiction, and, being of opinion that the case was not of equity cognizance, would dissolve the injunction, and order the bill dismissed.—*GREEN V. MILLS*, U. S. C. C. of App., 69 Fed. Rep. 852.

32. **FRAUDS, STATUTE OF—Contract for Sale of Goods.**—A parol contract between a creditor and a debtor whose property has been attached by the creditor, that in consideration of the debtor's allowing the creditor to take judgment the latter will purchase the goods attached at the sheriff's sale, and give the debtor credit for their cash price, irrespective of his bid at the sheriff's sale, is not a contract for the sale of goods, so as to bring it within the statute of frauds.—*J. COBS V. UNION MERCANTILE CO.*, Mont., 42 Pac. Rep. 109.

33. **FRAUDULENT CONVEYANCE—Chattel Mortgage.**—A chattel mortgage, made in good faith, will not be set aside as in fraud of creditors because after its execution the mortgagees agreed that the time for paying some of the installments should be extended, and consented to the payment of certain small sums which were being urgently pressed against the mortgagor.—*SANDERS V. MAIN*, Wash., 42 Pac. Rep. 122.

34. **FRAUDULENT CONVEYANCES—Mortgage on Crops—Husband and Wife.**—A deed of trust of crops to be raised is not a conveyance or transfer, within Code, § 2294, making a "transfer or conveyance of goods, chattels, or land" between husband and wife void, as to third persons, unless recorded.—*UNDERWOOD V. AINSWORTH*, Miss., 18 South. Rep. 379.

35. **GARNISHMENT—Property Subject to.**—Where, in an action against a non-resident, jurisdiction has been obtained of defendant and the garnishee, a debt due defendant by a resident, payable in another State, is subject to garnishment.—*CROSS V. BROWN*, R. I., 33 Atl. Rep. 147.

36. **HOMESTEAD—Abandonment.**—Where a husband, owning a homestead, took up his residence in another State, at the direction of his employer, but, after being discharged, did not return, such removal constituted an abandonment, and was not within Code, § 1981, providing for the retention of the homestead when the removal was temporary, and by reason of some

necessity.—*SALTER V. EMBREY*, Miss., 18 South. Rep. 373.

37. **INSURANCE—Proof of Loss—Waiver.**—A condition in a policy that proof of loss be furnished by the insurer within a certain time is waived where, within that time, the company's agent and adjuster requested and obtained from insured a written statement under oath in relation to the fire, etc., and a list of the articles destroyed, with an estimate of the value of each, and then said there was nothing more for insured to do.—*CAREY V. ALLEMANIA FIRE INS. CO. OF PITTSBURG*, Penn., 33 Atl. Rep. 185.

38. **JUDICIAL SALE—Bidding by Executor.**—One to whom property is struck off at an executor's sale cannot have the sale annulled because the executor bid; his bidding being *bona fide*, for the single purpose of obtaining the property for himself.—*RIGG V. SCHWEITZER*, Penn., 33 Atl. Rep. 116.

39. **JUDGMENT—Agreement to Enter.—Consideration.**—A complaint to enjoin the collection of a deficiency judgment, alleging that plaintiffs, the mortgagors, relying on the promise of the mortgagee not to enter a personal judgment against them, made default in the foreclosure suit, and did not appear at the sale, is defective, as it does not show a consideration for said promise, nor that plaintiffs were injured by their reliance thereon.—*HEIM V. BUTIN*, Cal., 42 Pac. Rep. 138.

40. **JUDGMENT—Revival—Lien.**—The lien of a judgment on a farm which defendant owned and lived on when judgment was entered is continued by a revival of the judgment by an amicable *scire facias*, signed by defendant alone, the record title and the possession remaining the same, notwithstanding a secret conveyance by defendant to his wife; and subsequent notice of the conveyance does not affect the lien, so that another proceeding for revival, based on the original judgment, against defendant and his wife, is not only unnecessary, but unauthorized.—*LYON V. CLEVELAND*, Penn., 33 Atl. Rep. 143.

41. **JUDGMENTS—Priority.**—Code 1882, § 310, provides that a final judgment entered in a court of record shall be a lien on the land of the judgment debtor for a period of 10 years, provided that plaintiff may, at any time within three years after the "active energy" has expired, revive the judgment with like lien as in the original. A judgment which was senior to a mortgage and two other judgments had lost its active energy by the lapse of 10 years; and, during the 8 years within which it could have been revived, execution was issued on one of the junior judgments, and the land sold, after which the senior judgment was revived: Held, that the lien under the senior judgment was lost, and therefore the purchaser could not claim title under the senior judgment so as to cut off the mortgage.—*KAMINSKY V. TRANHAM*, S. Car., 23 S. E. Rep. 132.

42. **JUDGMENT IN REPLEVIN—Alternative Form.**—It is not necessary that judgment in replevin be in the alternative, where the chattels have been previously sold by the judgment debtor.—*MCCARTHY V. STRAIT*, Colo., 42 Pac. Rep. 189.

43. **JUDGMENT ON BOND—Rights of Sureties.**—After a judgment has been entered in replevin against defendant and the sureties on his bond on the consent of defendant alone, an order allowing the sureties to interplead and move for the vacation of the same cannot be granted.—*MCDONALD V. MCBRYDE*, N. Car., 23 S. E. Rep. 103.

44. **LANDLORD AND TENANT—Construction of Lease.**—A lease for five years for a gross sum, payable in monthly installments in advance, and providing for entry on default of any installment, and that, if the building becomes untenable, rents shall cease until the landlord repairs, which he may do at his own option, does not, at inception, create a debt for the gross amount of the rent, but under it debt for rent can only be created by occupation after default.—*STRAMANN V. SCHEEREN*, Colo., 42 Pac. Rep. 191.

45. **LIEN—Prior Mortgage.**—Where an agricultural lien on crops to be grown provides that a debt due by

the owner of the crops, and secured by a prior recorded mortgage on the same crops, is to be paid out of the crops, the lienor will hold the crops or their proceeds to the amount of such debt as trustee for its payment.—*BRASFIELD V. POWELL*, N. Car., 23 S. E. Rep. 106.

46. **MECHANIC'S LIEN—Subcontractor.**—Where parties contracted to furnish ties to a railroad company, to be used in the construction of the road, and afterwards sublet the contract to one who contracted with plaintiff to haul and deliver the ties, plaintiff was entitled to a mechanic's lien for his labor.—*ECCLESTON V. HETTING*, Mont., 42 Pac. Rep. 105.

47. **MUNICIPAL BONDS—Fraudulent Issues—Estoppel.**—A statute of Kansas provides that every county, city, township, etc., may compromise and refund its indebtedness and issue new bonds, with interest coupons, in payment for the sum so compromised, the bonds to be signed and to contain certain recitals provided in the act, and to be issued by the proper officers to the holders of the indebtedness, and a record to be kept by the county clerks of the bonds issued in the several counties, showing the date, number, and amount, and to whom and on what account issued. Certain bonds were issued by the township of W, which purported to be issued under this act, and contained recitals that all its requirements had been complied with. The records of the governing board of the township showed that all the proper steps had been regularly taken, and that the bonds were issued to refund certain script held by one G, and were delivered to him. In fact, the bonds were issued to the owners of a sugar factory, to induce them to locate in the township, and the script held by G was issued to him, without consideration, to create an apparent debt to be refunded. A proposal by the owners of the factory to locate it in the township, in consideration of the bonds, and an agreement reciting the delivery of the bonds were copied into the record book of the governing board of the township, but formed no part of the records of the meetings at which the bonds were authorized, and were not mentioned or referred to in those records: Held, that as against a *bona fide* purchaser of the bonds, without notice of the falsity of the record and the recitals in the bonds, and of the illegal purpose for which they were in fact issued, the township was estopped to deny that the bonds were issued to refund its indebtedness.—*WEST PLAINS TP., MEADE COUNTY V. SAGE*, U. S. C. C. of App., 69 Fed. Rep. 943.

48. **MUNICIPAL BONDS—Renting Municipal Building.**—Where a building was erected, under an act permitting its erection in such a manner as to the town council seemed most expedient, and used for municipal purposes, the refunding of bonds issued to erect it will not be enjoined because an income was derived from letting parts thereof, but which was insufficient to pay insurance and interest on the debt.—*JONES V. CITY OF CAMDEN*, S. Car., 23 S. E. Rep. 141.

49. **MUNICIPAL CORPORATION—Opening and Grading Streets.**—Where, in a proceeding to open a street, the final decree in which was rendered eight months before the grading was authorized by ordinance, one disclaims "any damage for the property taken by the opening of said street," having at the same time and in the same court a proceeding of his own pending for assessment of damages for change of grade, which is not abandoned or even referred to, there is no waiver, either by estoppel or intention, or damages for the change of grade.—*CLARK V. CITY OF PHILADELPHIA*, Penn., 33 Atl. Rep. 124.

50. **NEGOTIABLE INSTRUMENTS—Defenses.**—Where notes given to a corporation by various persons in payment of subscriptions to its capital stock are assigned to a trustee, together with some of the stock itself, to collect for the payment of bonds issued, at the same time, to raise money to complete the work for which the corporation was organized, such trustee may, in behalf of the bondholders, maintain an ac-

tion on any of the notes, regardless of defenses that may exist as against the corporation itself.—*KINKEL v. HARPER*, Colo., 42 Pac. Rep. 173.

51. **NEGOTIABLE INSTRUMENT**—Indorsers of Notes—Notice.—Where plaintiff bank recognized certain persons, whose names appeared upon the back of a note, as indorsers, and treated them as such, they will be held to be indorsers, as to the bank, and as such, entitled to notice of dishonor.—*CAROLINA SAV. BANK v. FLORENCE TOBACO CO.*, S. Car., 23 S. E. Rep. 189.

52. **NEGOTIABLE INSTRUMENT**—Release of Surety.—In an action on a note with surety it appeared that the maker before its maturity transferred his property to a stranger to sell, and out of the proceeds pay the note; that after maturity all the parties agreed to a sale of the property on 15 days' notice of sale; that, a sale on the day fixed being impracticable, plaintiff consented to a postponement, and there was no evidence that the surety did not consent thereto. There was no evidence that the payee agreed to look wholly to the sale for payment of the debt or to release the surety: Held, that the surety was not released.—*PIMENTAL v. MARQUES*, Cal., 42 Pac. Rep. 159.

53. **NEW TRIAL**—Application.—Grounds of a motion for a new trial, which are expressed in terms so vague, general, or indefinite as not to indicate the nature or character of the errors alleged to have been committed, or which embrace utterly superfluous and unnecessary matter, such as lengthy colloquies between counsel on opposing sides, or between counsel and the court, tedious recitals of irrelevant facts, statements taken from the stenographic notes of the trial, and other like things, to such an extent as to bury the point in question under a great mass of entirely needless phraseology, and thus render it very difficult, if not impracticable, for this court to ascertain what was really the ruling or other conduct of the court complained of, will not be considered.—*GATE CITY GAS-LIGHT CO. v. FARLEY*, Ga., 23 S. E. Rep. 119.

54. **PARTNERSHIP BETWEEN HUSBAND AND WIFE**—Evidence.—Much more evidence is necessary to establish the existence of a business partnership between husband and wife than between persons not in that relation.—*JOHN BIRD CO. v. HURLEY*, Me., 33 Atl. Rep. 164.

55. **PAYMENT BY CHECK**—Diligence.—Where a check was received after banking hours, and on the following day the payee, in the usual course of business, deposited it in the bank in which he kept his account, and on the next day it was presented for payment to the drawee bank, at its place of business, during banking hours, but after 11:30 A. M., at which time the drawee failed, the payee is not chargeable with lack of diligence in presenting it for payment.—*LOUX v. FOX*, Penn., 33 Atl. Rep. 190.

56. **PLEADING**—Answer—Estoppel.—In an action to enjoin a city from laying its pipes over private land, defendant is not estopped to deny plaintiff's ownership by the fact that it has instituted proceedings against plaintiff to condemn such land.—*COLBY v. CITY OF SPOKANE*, Wash., 42 Pac. Rep. 112.

57. **PRINCIPAL AND AGENT**—Authority to Sign Notes.—The G Co., a manufacturing and trading corporation located in Ohio, had a branch in Missouri, which was conducted by one D, as general agent and manager, and at which a large business was carried on, in the purchase and working up of raw material, and the sale of the finished product over a large territory. D was left in full control of all departments of this business conducted in Missouri, and managed all its affairs, financial and other, with the knowledge and consent of the officers of the G Co., and generally without directions or oversight by them. He reported to the G Co. from time to time, and some of his reports showed entries of "bills payable." Upon the trial of an action against the G Co. upon notes signed in its name by D, as treasurer, the president of the G Co. testified that he knew that D was signing all the bills payable made by the Missouri concern for goods purchased;

that he supposed it was the natural order of things for D to procure the discount of bills receivable by indorsing them as treasurer of the G Co.; and that, if money were required in an emergency, he supposed D would be expected to make and procure the discount of the company's notes: Held, that D, being left in the absolute control and management of the whole business of the G Co. in Missouri, to act on his discretion, had authority to do whatever a reasonably prudent merchant or manufacturer would do, and, accordingly, to sign promissory notes in the name of the G Co.—*GLIDDEN & JOY VARNISH CO. OF OHIO v. INTERSTATE NAT. BANK OF KANSAS CITY*, U. S. C. C. of App., 69 Fed. Rep. 912.

58. **PUBLIC LANDS**—Cutting Timber from Mineral Lands.—On the trial of an indictment for cutting timber from the mineral lands of the United States for purposes other than those connected with building, agricultural, mining, or other domestic uses, contrary to the act of June 3, 1878, the intent is wholly immaterial, and it is only necessary to show that the prohibited acts were done.—*UNITED STATES v. REDER*, U. S. D. C. (S. Dak.), 69 Fed. Rep. 965.

59. **PUBLIC LANDS**—Exclusion from Grant.—It is not necessary, in order to exclude lands from the operation of a grant by congress in aid of a railroad company, that title to such lands should have passed to another company, but it is sufficient if such lands have been in any way segregated from the public domain, so as to indicate an intention to exclude them from the grant.—*UNITED STATES v. OREGON & C. R. CO.*, U. S. C. C. (Oreg.), 69 Fed. Rep. 899.

60. **PUBLIC LANDS**—Timber.—Mesquite, a small tree indigenous to deserts, used only for firewood, and not used in the manufacture of any useful article, is not "timber" within the meaning of Rev. St. U. S. § 2461, making it a crime to cut, etc., timber from the public lands of the United States.—*BUSTAMANTE v. UNITED STATES*, Ariz., 42 Pac. Rep. 111.

61. **RAILROAD COMPANY**—Street Railway—Repair of Streets.—Where the charter of a street car company and city ordinances require it to repair and repave streets occupied by it, such duty extends to the replacement of an old pavement by a new one of a different and improved kind, ordered by the city.—*CITY OF PHILADELPHIA v. THIRTEENTH & FIFTEENTH STS. PASS. RY. CO.*, Penn., 33 Atl. Rep. 126.

62. **RECOGNIZANCE**—Execution.—A recognizance, though signed by one as surety, is not binding on him, he not having been before the magistrate who signed it as having been taken and acknowledged before him.—*COMMONWEALTH v. HICKEY*, Penn., 33 Atl. Rep. 198.

63. **REMOVAL OF CAUSES**—Jurisdiction to Determine.—The State court in which an action has been commenced, if an application is made to it for an order of removal to a Federal court, and the Federal court to which removal is sought, have an equal right to determine whether, upon the face of the record and the petition for removal, a proper case for removal is made out.—*SPRINGER v. HOWES*, U. S. C. C. (N. Car.), 69 Fed. Rep. 849.

64. **REFPLEVIN BOND**—Judgment.—A judgment in replevin that at commencement of the action the right of possession was in the plaintiff, that costs be taxed against defendant, and showing that they have been paid, will not support an action for breach of a delivery bond conditioned to deliver the property to plaintiff if delivery be adjudged, and to pay costs and damages awarded against defendant on failure to return the property.—*LEWIN v. STEIN*, Colo., 42 Pac. Rep. 185.

65. **SALE**—Rescission—False Representations.—Statements on the sale of a note secured by a mortgage, as to the condition of the property covered by the mortgage, which the vendor alleged were based on information derived from third persons, are expressions of opinion, and, if untrue, afford no ground for a rescission of the sale, where the vendor refused to guaranty the note, and the vendees took other steps to

ascertain for themselves the value of the note and mortgage.—*ENGLISH V. GRINSTEAD*, Wash., 42 Pac. Rep. 121.

66. **SALE—When Title Passes.**—Where a manufacturer contracted to manufacture goods for another, and store them in the former's warehouse, to be shipped as instructed, the purchaser to pay for the goods as fast as they were made and stored by honoring the manufacturer's drafts when presented with warehouse receipts attached to the same, and where the latter issued a warehouse receipt reciting that a specified quantity of the goods had been so made and stored, the facts, however, being that, although the goods had been actually manufactured, they needed some slight work to put them in merchantable condition as required by the contract, and had not been removed from the factory to the warehouse, and the purchaser paid a draft for the price of these goods, to which this receipt was attached,—under these facts the title to the goods passed to the purchaser as against the claim of a receiver who was appointed at the instance of creditors to take charge of the manufacturer's assets, and who had accordingly seized the goods in question before their actual shipment to the purchaser.—*SHEPARD V. KING*, Ga., 23 S. E. Rep. 113.

67. **SALE OR AGENCY.**—A writing, in the form of a bond, providing that plaintiff was to "supply" the principal therein with goods at a fixed price, to be paid when the goods were disposed of by such principal, but not restricting control of the goods by such principal, or providing for commissions on the sales to be made by him imports a sale to him, and not an agency.—*LEMP V. RYUS*, Colo., 42 Pac. Rep. 169.

68. **SEDUCTION—Consent.**—Where it was apparent from the testimony of prosecutrix in a prosecution for seduction that she yielded to defendant's solicitations, but she testified that she did not expressly consent to the act, the jury properly subordinated the literal terms to the substance of the evidence.—*PEOPLE V. WALLACE*, Cal., 42 Pac. Rep. 159.

69. **SPECIFIC PERFORMANCE**—Evidence of Parol Contract.—The respondent, W B, promised his brother, P B, that if the brother would refrain from making a will, and thus leave the respondent, as heir and next of kin, the sole inheritor of all his brother's estate, he, the respondent, would pay a certain annuity out of such estate to a certain relative of the two parties: Held, that such a promise, if acted upon, may be enforced in equity, the court abiding by the case of *Gilpatrick v. Gildden*, 16 Atl. Rep. 464, 81 Me. 137.—*GRANT V. BRADSTREET*, Me., 33 Atl. Rep. 165.

70. **TAXATION—Assessment of Poll Tax.**—Under the revenue act (Laws 1891, 2d Sess., p. 123, § 171), providing that the assessor may require a person to make a verified statement showing the number of his employees subject to taxation, a demand in writing, signed by the assessor in his official capacity, requiring a compliance with said statute, and served upon a member of a partnership, was sufficient, and it was not necessary that said assessor should personally swear as to the one upon whom demand was made.—*STATE V. OWSLEY*, Mont., 42 Pac. Rep. 105.

71. **TAXATION—Occupation License.**—Where the license ordinances of a town or city for a given year require the issue of a license for, and impose a license tax upon, the conduct of a particular business, and also impose a specific license tax upon the use by such a licensee of a particular agency necessary to be employed in the conduct of that business, a person licensed to conduct such business takes his license subject to all the provisions of the license ordinances of that year; and if, in such general business, he employ an agency which is itself subject to a specific license tax, he becomes liable for such tax.—*MACON SASH, DOOR & LUMBER CO. V. MAYOR, ETC., OF CITY OF MACON*, Ga., 23 S. E. Rep. 120.

72. **TAX TITLE—Payment of Taxes before Sale.**—One in possession of land is not estopped by lapse of time from defeating a tax title, by showing that the taxes

for which the land was sold were in fact paid before sale.—*NICKUM V. DANVERS*, Oreg., 42 Pac. Rep. 180.

73. **TELEGRAPH COMPANIES—Penalty.**—According to the decision of this court in *Telegraph Co. v. James*, 16 S. E. Rep. 88, 90 Ga. 254, there could be a lawful recovery of the statutory penalty from a telegraph company for negligence in delivering a message at one of its offices in this State, although the message came from an office in another State, notwithstanding the provisions of the interstate commerce clause of the federal constitution.—*WESTERN UNION TEL. CO. V. LARK*, Ga., 23 S. E. Rep. 118.

74. **TELEGRAPH COMPANIES—Unlawful Transactions.**—An action will not lie against a telegraph company for damages caused by its failure, through negligence, to deliver a message relating to transactions in cotton futures.—*GIST V. WESTERN UNION TEL. CO.*, S. C., 23 S. E. Rep. 143.

75. **TENANTS IN COMMON—Joint Action.**—Where tenants in common mortgage their common property to secure the debt of one, on his promise to reimburse them for any loss on account thereof, and the property is sold to pay the debt, they may maintain a joint action against him.—*McGILL V. McGILL*, Penn., 33 Atl. Rep. 146.

76. **TRIAL BY COURT—Additional Findings.**—Where a case has been tried by the court upon waiver of a jury, and the court has decided it, and made special findings covering the ultimate facts of the case, additional findings cannot afterwards be made upon the request of a party.—*LANG V. BAXTER*, U. S. C. C. (Me.), 69 Fed. Rep. 905.

77. **TRUSTS—Monopolies.**—The act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, is not applicable to the case of a State which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895). A State is neither a "person" nor a "corporation," within the meaning of the act of congress.—*LOWENSTEIN V. EVENS*, U. S. C. C. (S. C.), 69 Fed. Rep. 908.

78. **TRUST—Resulting Trust.**—There is no resulting trust in favor of the wife in land purchased by the husband, on his credit, though part of the purchase price was paid with money subsequently borrowed from her.—*WOODSIDE V. HEWEL*, Cal., 42 Pac. Rep. 152.

79. **WILLS—Proof of Execution—Witness.**—Where, upon the trial of an issue of *devisavit vel non*, a subscribing witness to the will, from want of memory or other cause, is unable or unwilling to testify to its attestation by himself or by the other subscribing witnesses, or to the execution of the will by the testator, or to the fact that the testator was mentally capable of making a will, or where a subscribing witness in his evidence denies the existence of any of these facts, the same may be proved by any competent witness having knowledge thereof, although the latter was not a subscribing witness to the will.—*GILLIS V. GILLIS*, Ga., 23 S. E. Rep. 107.

80. **WILL—Testamentary Capacity.**—To establish a will, contested on the ground of the want of testamentary capacity, it must appear that the testatrix was a person of "sound and disposing mind;" that she had mental capacity sufficient to enable her to understand the business in which she was engaged. A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds. It exists when the testator can recall the general nature, conditions, and extent of his property, and his relations to those to whom he gives as well as to those from whom he withholds his bounty. There must be active memory enough to bring to mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them, and form some rational judgment in relation to them.—*HALL V. PERRY*, Me., 33 Atl. Rep. 160.